IP BULLETIN

A HALF YEARLY *E- MAGEZINE ON IPR POLICY*

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DISCLAIMER

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Acknowledgement

I express my deep gratitude to Hon'ble Vice Chancellor Justice Mrs Mridula Mishra, Hon'ble Registrar Shri Manoranjan Prasad Srivastava, for their free hand generous sup- port in bringing this bulletin release. I also express my profound sense of gratitude to all the contributors, all the Hon'ble members of the Editorial Board, my colleagues at CNLU. I acknowledge the sincere efforts of composition team- Ms. Reshma Singh, Ms. Baishali Jain, Mr. Shrey Bhatnagar and Mr. Amit Kumar (IT) for giving this journal a proper shape, publication and release.

ABOUT CNLU

In the State of Bihar, where the seeds of the earliest republic were sown and the crop of democracy cultivated, a need was felt by the government for a university which would provide quality legal education and strive to raise national legal standards to competitive international- al level and promote legal awareness in the community, which will lead to the realization of goals embodied in the Constitution of India. Thus, on July 15th, 2006 came into being Chanakya National Law University at Patna un- der the able guidance of its Vice - Chancellor/ Pro - Chancellor, Prof. Dr. A. Lakshminath, former Dean and Registrar, NALSAR University of Law, Hyderabad. CNLU was established under the Chanakya National Law University Act, 2006 (Bihar Act No. 24 of 2006) and included in section 2(f) & 12(B) of the U.G.C. Act, 1956. No Educational Institution is complete without adequate facilities to its Students, Faculties & Employees.

CNLU provides wide range of facilities on its campus. A well-managed residential accommodation with modern facility provided to students. Mess & Canteen facilities on campus provide everything from a simple coffee and sandwich to a full meal. University provides a full range of medical services for students & for employees who register as patients. In addition to general practice services, CNLU provides a range of specialist clinics and visiting practitioners. University organised regular careers fairs, training workshops, and one-to-one guidance for students. Counselling Service aims to enable students to achieve their academic and person- al goals by providing confidential counselling and support for any difficulties encountered while at CNLU. University provides a wide range of IT services including campus internet access via a wireless network and in student residences. Number of retired Judges of the Supreme Court, High Courts and lower Judiciary as well as Senior Advocates & Educationalist have offered to assist the CNLU in its teaching and re- search programmes making education at CNLU a rare and exciting experience to the student body. CNLU admired example of maintaining financial autonomy along with greater accountability. It is equipped with the state-of-art infra- structure for successful imparting of legal education of the highest standards. The faculty at CNLU comprises highly acclaimed and experienced academicians who are proactively involved in grooming the younger generation to take CNLU to greater heights. The construction work of the university spread on 18 acres of land at Nyaya Nagar, Mithapur near Mithapur Bus stand, Jakkanpur Police Station, Patna. A sprawling lawn with various types of palm trees has adds beauty to the landscape

ABOUT CIRF IN IPHD

Innovation is an imaginative initiative to resolve socio-economic –cultural –scientific-technological problems of everyday life. Wherever we are, innovation is required for advancement-progress- prosperity. Innovation motivates for research – searching the solution to a problem. The intellec- tual property is a creation of mind. It is in the form of copyright, patents, Trademarks, design, inte- grated circuit lay out design, trade secret, and geographical indications, bio-technological inven- tions, traditional knowledge, inventions related to plant varieties, farmers', and plant breeders' rights. Every types of intellectual creation is socio-economic oriented. But there is requirement of protection to the creators for their economic and moral rights involved in it. At the same time, the dissemination of intellectual property knowledge among the society is essential. The industry also requires connection and involvement. IPR is a subject interconnected with almost all walks of human life today. The requirements of in- novation in MSME cannot be denied which furthers employment in organised as well as unorgan- ised sector. Likewise, the sports sector is closely connected with intellectual properties: patents, copyrights, design, trademarks, and traditional knowledge, etc. The tourism has become a mega source of commerce and employment, where in the innovation is every time a challenge. The Na- tional policy on IPR deals with the creation of Human capital with the same spirit that Human Rights tries to protect the Humanity. Hence, the Chanakya National Law University aims to encourage research and innovation in IP and interconnected areas, i.e. Entrepreneurship, Sports, Tourism and Human Rights, through this Centre. The Centre will strive for the cause of economic development of the people of Bihar and all the persons/ innovators in general in IP and inter-connected areas –entrepreneurship, sports, tourism, and ultimately Human development by protecting Human Rights.

OBJECTIVES

	Institutional Activities	*Collaborative Activities*
□	Awareness towards intellectual property Rights through seminar /Conference/ Workshop/Symposium and Innovation March.	• IP and Sports industry • IP and Tourism • Global Trade in IP and Human rights • IP and entrepreneurship. • IP, Corporate and Competition. • IP and Information security. • IP, Humanities and Human Development • Community IP, Benefit Sharing and Economic development • Collaboration with Universities, NIPER, and RESEARCH CEN- TRES. • Industry –University collaboration,
□	Institutional project research from government Institutions/Research organisations in India/Abroad.	
□ □	Inter-University Collaboration for research in the field of Intellectual property.	
□	Facilitation Centre for registration and commercialisation related activities.	
□	Consultancy facility from expert.	
□	Publication of 'Research Journal in IP' and 'Inter-disciplinary journal' and 'Books'	
□	Organising Professional development pro- gram and Certificate courses.	
	Setting up Student IPR Club.	

INTELLECTUAL PROPERTY BULLETIN

(ISSN No ..... To be obtained after release)

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Hon'ble Justice Smt, Mridula Mishra, VC, CNLU.

It's a matter of great pride and pleasure that the Centre for Innovation Research and Facilitation in Intellectual Property for Humanity and Development (CIRF in IPHD) of Chanakya Law University is releasing a magazine namely: I P BULLETIN, quarterly. The Bulletin has a feature of magazine with an effort to accommodate the application of IPR in industries and significance in business, disseminate the programs of the centre, IPR discussion and debates, innovations in industries and MSME. This is a journal cum newsletter for encouraging the students' entrepreneurs, academicians, and professionals to write column, case study and judgement analysis in the field of IPR.IT has aim to make the stake holders aware about IPRs. The contents are well arranged and informative. It will prove beneficial to all the stake holders. This journal is a magazine on National IPR Policy of the Govt. of India. This magazine contains the implication aspects of intellectual property, starting from awareness program, capacity building, entrepreneur- ship and industrial application. The IP Bulletin will work as per the policy of the government to harnessing the natural resources for employment and economic development. This bulletin discusses the crisp policies, DIPP policy towards Intellectual Property creation, Commercialization in India. This IP bulletin discusses the India's growth stories in IPR Regime despite Vice-Chancellor 10 8 pandemic conditions which is a proved fact with the invention of covaxin and Covisheild. I wish all the best to the entire Team for this creative forum.

REGISTRAR'S MESSAGE

Shree Manoranjan Prasad Shrivastava, Registrar, CNLU.

The IP Bulletin published by the centre is another miles stone in its venture for the dissemination of Intellectual Property among the academia, professionals, entrepreneurs, consumers etc. The academic Journal carries on materials for analysis, debates and discussion, but the magazine deals with Miscellaneous pieces. It discusses the current issues and opinion of the concerned persons. It widens the Knowledge of the readers. With this reference, this Bulletin has been launched to provide news on IPR, Application of IPR in the industries, consumers' benefits, Innovation by the students, awareness programs And scope in the field of IPR .The bulletin expects to present the world the application of IPR in our day to day life .How IPR has become a part and parcel of our life, industry and business and employment. This Bulletin will prove a veryinformative forum for all the stake holders.

The National Policy on IPR is a vision document for intellectual creation, industrialization, Commercialization, employment generation and economic growth. IPR is a creation of human mind which has potential to bring massive change if it is applied properly. IPR is the essential tool of entrepreneurship. This IP Bulletin intends to create awareness among the professionals, entrepreneurs, industrial and commercial worlds. The bulletin will collect and organize material for the economic development to all the stake holders in future. I wish all success to the bulletin and All the best.

EDITORIAL NOTE

Prof Shubhash C Roy,
Professor of Law, Dean, R & D, Director

The I.P.BULLETIN (Intellectual Property Bulletin is a publication of the Centre for Innovation Research and Facilitation in Intellectual Property for Humanity and Development (CIRF-in- IPHD). It is a Magazine, ISSN …..To be obtained as per rule. It carries news, column, case reports, essay writings events and activities, research in the domain of Intellectual Property Rights. It has to carry the application of intellectual creation which are of commercial significance. Intellectual property is a creation of mind. Why does it require protection? Whether all of us are aware of the Intellectual Property? Whether Intellectual property can speedup industrialization, commercialisation and generate employment? Whether Intellectual Property can boost up 'Make in India: Made in India; 'Stand up India: Start up India' Program? Whether Intellectual Creation have potency of making 'Self-Reliant Bharat' (Atma Nirbhar)? The Government of India has formulated 'National I P Policy' in 2016 with a slogan 'Creative India: Innovative India'. It aims to IPR Awareness: Outreach and Promotion , To stimulate the generation of IPR, Legal and Legislative Framework - To have strong and effective IPR laws, which balances the interests of rights owners with larger public interest, Administration and Management - To modernize and strengthen service oriented IPR administration, Commercialization of IPR - Get value for IPRs through commercialization, Enforcement and Adjudication - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements, Human Capital Development - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPR.

The I P BULLETIN is another venture of the Centre with respect to the National IPR Policy 2016, innovation policy 2019 and science and technology policy 2020, to work for MSME. They have been working towards the propagation of creativity, innovation, industrialization and commercialization of intellectual property. This Bulletin has features like events, columns, news, research information, case review, essays etc. The first Half Yearly Vol. II July – December issue 2 of December 2021 is hereby submitted before the learned scholars, policy makers, entrepreneurs, MSME, Businessman, administrators, agriculturists and all the concerned stake holders.

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ANALYSIS OF RECOMMENDATIONS MADE ON LAW OF PATENTS IN 161ST PARLIAMENTARY REPORT

*Vasundhra Kaushik**

ABSTRACT

One of the principles of good governance requires a continuous or regular refinement of the laws of the country, in order to bring the laws on an equal footing with the emerging societal needs and technological trends. They should be improved and revised in such ways that they can assist the governments in delivering an intellectually sound and flourishing domain for technological advancements as well as for the efforts put into the research and development of the same. Thus, the responsibility to bring about such vital and legitimate modifications rests with the concerned parliamentary committees and departments by organizing and carrying out meetings for deliberating the above issues circling the laws of Intellectual Property, the rights of the people associated with it, and its role in country's economy.

Through the study made in the following paper, the author has made an attempt to summarise and analyse the crucial proposals presented before the parliament by different departments regarding the laws of Patents in India and recommendations made by the Department Related Parliamentary Standing Committee on Commerce to the respective departments, following on the same. It discusses in brief the concerns and the suggestions to resolve those concerns as put forward by the DPIIT, Ministry of Commerce and Industry, and other prominent law firms in India about all the necessary modernization required in the selective sections and clauses of the respective act or acts governing the practice of obtaining and granting of patents in the country.

INTRODUCTION

The Parliament of India, through its One Hundred and Sixty-First report, provides a 'Review of the Intellectual Property Rights Regime in India'. The report was presented and laid before the Rajya Sabha and Lok Sabha respectively on 23rd July 2021. A rigorous review of the different categories of IPR legislations in India was taken up and presented before the parliament. The Department Related Parliamentary Standing Committee on Commerce prepared and presented the 161st report on the Review of IPRs in India, headed by Dr. V.V. Reddy. Various current and possible future issues were taken up in the IPR policy review.

The Department for Promotion of Industry and Internal Trade (DPIIT) briefed the committee through its report, about the lack of awareness of IPRs in the country. It presented a tally of patent filings by Indian and Foreign entities where it was noticed that the patent filings made by Indian entities amount to only 36% of the total share while the rest of the majority of patent filing, comprising 64% was done by the foreign entities. The reason behind such low filings by Indian entities, as the committee was made aware of was due to the lack of a fixed criterion to decide upon the novelty of products or measure the creativeness of the product in question. There is an absence of proper knowledge about IPRs amongst the countrymen, along with scientific temperament. However, imparting such knowledge of establishing novelty in any creation or innovation in India is inadequate.

REPORT OF THE COMMITTEE ON PATENTS AND THE PATENTS ACT, 1970

Although the Patents Act was enacted in 1970, however, in 1995 after the inclusion of India in the TRIPS agreement, the Indian patent regime observed significant changes and thereafter, the Patent (Amendments) Act, 2005 was enacted that came into force on 1st January 2005, in order to meet with the requirements of the TRIPS agreement. The committee was advised that since the amendment took place 15 years ago, it is now time to modify the act of 1970 to make it more compatible with the current and dynamic pace of the world of patents. Following suggestions have been provided to the committee:

1. Section 3(b) of the act provides wide discretion to the Controller to cease the usage of any technology without any guidelines for refusal and safeguard against any arbitrary

prohibition by the controller that might lead to refusal of use of socially useful technology like the nicotine chewing gum, that has been denied patent protection under the said section. The committee has recommended to the department to amend the provision to the extent of limiting the arbitrary powers of the collector, to provide a safeguard mechanism against the refusal. But such amendments should be made keeping in mind that such technologies, which have been barred by the law for the time being in force, shouldn't slip through the crack provided by the amendment.

The department is rightful in proposing limitations on the wide powers vested in the hands of a single authority. It could be misused not only by the controller itself but also by concerned parties in deviating the control in their interest. In this way, the abuse of such wide powers without any supervising mechanism, can take place within the staff members and also on orders of any external stakeholders. The controller could also be threatened and forcibly influenced to either refuse the application of a socially beneficial invention or accept such invention that goes beyond the fetters of law, against the laws of nature, or such inventions that could cause public disorder by malignant forces. In case an occurrence of unjustified rejection of application takes place, the department and the committee have carefully considered the same and deliberated over the creation of mandatory guidelines that need to be abided by the controller, in order to ensure the honest exercise of powers vested under section 3(b). The department within the mandatory guidelines, could also set a fixed amount of penalty to be paid by the controller or any such necessary term of imprisonment, in case it is found to have used its discretion ultra vires the statute or as a result of the baseless and illegal refusal, an unfortunate incident is caused.

2. Section 3(c) of the act prohibits the protection of patents to the discovery of any scientific principle, abstract theory, and discovery of any living or non-living thing. The department has been recommended by the committee to look into the possible viability of granting patent protection to the discoveries of the occurrence of non-living substances in nature and the impact of the protection on public interest.

The culture of a provisional patent, for the protection of abstract theories and discovery of non-living things, must be provided to the patentee. The department should formulate the procedure and rules on the basis of which the discovery of a non-living entity in

nature can take place and meanwhile, the patentee can explore the practical possibilities of its idea and methods of converting it from abstract to the material form. This way, we can ensure the great minds are appreciated, encouraged and with their help, the country is pushed to the top and leads the world in terms of intellectual innovations. The committee is right in not promptly declaring to provide patent protection to discoveries of non-living substances present in nature. They should first focus on what categories of non-living entities are available in nature and how much of it can be utilized in favour of the public and ultimately, the country. The department should look into the economical aspect that whether it will be feasible for it to grant a patent and further allow R&D into it or not. There should be enough pieces of evidence to enable the patentee to meet the criteria of patent protection for the discovery, without engaging in biasness against the ones seeking protection for their novel, original innovations. Discovery is to find something that is either old and lost or that is new and until it has been established that the discovery is novel, the protection of patent over it has to be put on hold.

3. Section 3(j) of the act prohibits patent protection for the patenting of plant seeds, varieties, species, and essentially biological processes for the production or propagation of plants. The committee was apprised that patent protection, at a subsidized rate, should be provided for the above and the government along with private entities of the country should be a stakeholder in the patent. This would result in double benefits where the farmers would be able to enjoy the benefits accrued by them after receiving the patent protection at a reasonable rate and the private entities can be charged with the market rate of the patents for using the same product. The committee, on this report of the department, recommended it to grant patents to such plants and seeds that are favourable to the economy with a pre-condition of assurance of participation of the Government in the patents. It also recommended that the department should deliberate about the same with the farmers and possible private stakeholders.

4. Section 122(2) of the act of 1970 provides for imprisonment of up to six months in case a person has furnished any false information or statement that it was aware of or believed beforehand to be false. The department informed that the imprisonment is too stringent and must be replaced with a monetary compensation/penalty. The committee has recommended the department to look into the stringency of the said imprisonment.

Many theories of crime and criminal behaviours believe that if the criminal is severely punished for an act of crime, it will discourage new crimes and criminals. However, false information on a document cannot be put at par with a heinous crime for which there is a need for stringent punishment. Punishments and imprisonments leave a mark on the character of the person committing a wrongful act, and merely an error in documents, whether or not caused consciously, does not qualify for an act of crime needing a harsh and stringent punishment. There may be incidences where the patentee is someone else and the application is filed by a third person, who in order to sabotage the efforts of the patentee furnishes any false information. Now, since the name on the form is of the patentee and the information mentioned is false which the patentee also has full knowledge of it being false, the patentee shall be deemed to be a forger or a counterfeiter and put behind the bars for six months and during the same period, any third person may file an application for patent protection for the same product and receive a patent in his or her name. Such act of malice deserves to be punished and discouraged more than the acts making honest mistakes.

To make mistake is to humans and all humans make mistakes while filling up a form, especially the ones for which we have to be exercise extra precaution. And if one is informed immediately before filing the patent application that in case a piece of information is found to be false and within the knowledge of the patentee, the patentee will have to face six months prison time for it, the chances of making unconscious mistakes increase especially because of nervousness. They may also fall prey to committing mistakes quite nimbly if their mind is dominated by the fact that there is no second chance and only a blot on the character of becoming a criminal.

The department can put a limit on repeating the same documentary mistakes after which the same application by the same patentee can be disbarred from filing a patent application on account of regularly furnishing of false information, which may be punishment enough, along with a hefty monetary penalty. The amount of penalty can also be increased in accordance with the frequency of furnishing false information.

5. Section 11B of the Patents Act, 1970 read with Rule 24B of the Patents Rules, 2003 stipulates that a time period of 48 months is provided for the examination of a patent

application from the date of filing of the application or priority after the expiry of which, the application wouldn't be examined and it would deem to be withdrawn by the applicant. The department presented that the period of 4 years is too extensive and should be reduced. The committee recommended the department reduce the time limit in order to avoid any unnecessary delay in patent filings and examinations.

There have been several instances where the FER (First Examination Report) has been issued 10 years after the filing of the application, leading many of the applicants to abandon their applications. Sometimes it was no longer practical for applicants to continue because market conditions had changed.[1] After receiving the FER, the patentee has to itself go through the report, modify its application, and finally reply to objections, if any, as received in the FER. The same process might take more than months depending upon the understanding and availability of the patentee. Since the time limit for the examination of a patent application is 4 years, many officials do not even bother to start the same before the end of 3rd year. Many start the examination in the fourth year citing a backlog of applications leading the patentee to abandon the hope of fruitful returns on his or her innovations. This further creates a sense of pessimism amongst the potential future patentees and they discontinue the path of converting their innovative useful ideas into physical material. This delay would further affect the investment opportunities in the innovation, one innovation may get preference over the other. If the ideas are not converted into material or there is a significant delay, it will reach late to the market and then to the customers. A lot of start-up ideas depend upon patent protection as it makes it easy for them to secure investment and a team and facilities for research and development and in case there is an unreasonable and unexplained delay on part of the patent offices, it reflects upon the unwillingness of a country to support and promote its entrepreneurs and start-ups.

6. Section 21(1) of the act of 1970 provides that the patent application shall be deemed to be abandoned by the applicant or patentee unless the applicant has complied with all

[1] Joginder Singh & Piyush Sharma, *Compensating delays in granting Patents,* LexOrbis (Sep. 12, 2021, 12:30 PM), https://www.lexorbis.com/compensating-delay-in-granting-of-patents/.

the requirements specified in the act of 1970 within a prescribed time. Such inflexibility results in less filing of patents over which the committee opined that such restrictive section that presumes abandonment of the patent application after non-compliance of only a few requirements by the applicant without hearing or allowing a petition on its behalf is demoralizing and discourages the patentees to file for an application. It recommended the department revise the section and allow some space for minor errors by making it more flexible and a minor penalty or fee must be decided as a consequence of non-compliance with a few requirements of the act to avoid outright rejection of the same.

Apart from the delay that is usually caused on the part of the patent law offices while the examination of the patents, stringency to comply with every detail and specifics within a specified time period without any extension during the filing of a patent application, causes the decline in the interest of the applicants in filing for patent protection. Section 21(1), as mentioned by the department, is rigid and leaves no space for an extended period for complying and submitting all the required documents by the book. A window of the extension needs to be provided before declaring the application to be abandoned. There should be alternate options in case the specific document is not present with the patentee and a reasonable time for either filing a petition or an application for extension of time in order to provide all the relevant details should be provided.

7. Section 106 of the act disallows the filing of any suit for a declaration under 105 and for relief under section 106 or a suit for infringement of a patent in any court inferior to a district court. The department apprised the committee of the over-burdened responsibility of the judiciary and for the establishment of a zone-to-zone IPR dispute resolution centre consisting of experts to conclude the disputes fast. The committee, keeping in mind the rapid growth of technologies in the country leading to an increase in IPR disputes, recommended the department to modify section 104 promoting the inclusion of ADR in dealing with IPR disputes followed by the setting up of local IPR mediation or arbitration centres.

A lawyer isn't a person whose professional description includes possessing the knowledge of all laws of the land but instead, it includes the application of those laws,

that is, how to apply those laws and, not every lawyer can be expected to know the application of all the laws. Similarly, when a matter falling within the domain of the infringement or any other issue of IPR is brought before a district judge which has no or very less expertise in the subject, it cannot be expected by the judges to provide expedited justice through immediate judgments and orders without first thoroughly reading about the subject matter that they might not be regularly accustomed to. Since IPRs involve a lot of inquiries into technologies and their legal dimensions, it is more expedient to settle the disputes, whether it is a suit for declaration or a suit for infringement, before a person who possesses proficiency and good command over the matter and laws of patent. For the same, it is better to establish local ADR centres. There already exist various mediation centres under different HCs in the country for resolving disputable matters relating to business, family matters, etc., and hence, similar ADR centres, in order to lessen the burden of the judiciary providing arbitration, mediation, etc., for settlement of patent disputes, can also be set up at local levels to dispose the matters and deliver justice to the aggrieved without any hassle. This will inspire even the students pursuing legal and technical courses to take more interest, study more about IPRs and proceed their career into the field of IPR without any worries about the scope of the future in the same.

8. Further interactions between the committee and department raised the issue of the complaints made by various IPR firms expressing the complexity of the information available on the websites of Indian patent law offices that makes it cumbersome for the people to file patents and conduct an online search. The committee recommended the department modify and upgrade the website in order to make it user-friendly and offer the users easy travel through the website.

A person in its nascent stage of patent application might find it hard to easily comprehend the legal language present on the website of patent law offices. In fact, the person might not be even aware of whether the novel creation made by it is covered or is qualified for patent protection or not. The websites should be required to display their services, offers, and about themselves keeping in mind that the applicant may not be well versed in the legal world. Therefore, instead of going through the tiresome process of first acquainting themselves with basic legal language, they prefer not to indulge themselves in the filing of applications. The websites should avoid the use of any heavy vocabulary just for the sake of providing a high

profile, illustrious, and professional image of their websites. They can decrease the intricate language and help their websites by simply using visual images to guide the first-time users of the websites.

The department can help set up an online/offline desk similar to customer services or service centres of huge industries where such patentees who are either not very fluent in the online search or are not able to understand the language of the patent law websites can contact them and are able to receive step by step guidance to read, understand and file the patent applications. The establishment of such centres can create more job opportunities for people as well.

Apart from the above specific observations made and deliverance of the most suitable suggestions for amendments in the Patent Act of 1970 by the concerned parliamentary authorities and other connected departments of the country, the committee was apprised of the provision of 'Patent Pending' that is provided under the Patent laws of the USA. Patent Pending, as informed by the various stakeholders to the committee, is the status that is provided to an innovative product that indicates the existing patent application applied for it under the office of USPTO (United States Patent and Trademark Office). Once this status is granted to an applicant for its product, it can sell its product in a safe market. Upon the inquiry of the committee over the absence of such provision India, it was provided with two reasons, one being the lack of awareness of IPRs in India as compared to the USA and the secondly, section 11A of the act of 1970 was already in place providing a safe haven to the applicants. The section provides the applicants with the same set of rights granted to a patent holder from the date of publication of the patent application till the date of grant of the patent, except for the right to initiate any proceedings for patent infringement of its product until it receives the patent for it.

The benefits of the status and provision of 'Patent Pending' as informed to the committee is that it encourages the applicants or the patentees to notify the public about the patent status of their product, further discouraging the potential patent infringers and informing them about their liabilities of paying damages once the patent is granted and also of seizure, and injunction. Hence, the label would not only avoid unnecessary infringements but advantageously could be a good marketing tool that would establish authenticity and genuineness of the product thereby

encouraging further inventions and innovations in the country.[2]

Taking into consideration the above advantageous outcomes of obtaining a status of 'Patent Pending' the committee recommended introducing and implanting the same provision in Indian patent laws as well. The committee held the view that it could successfully act as a deterrent to IP crimes of unauthorized copying or counterfeiting of products and avoiding unnecessary infringements which will only further the credibility, its legitimacy, and validity that in turn would generate maximum possible economic benefits of the patents and make it market-friendly.[3]

CONCLUSION

The importance and necessity of introducing regular amendments in the written and codified legislative statutes can be put on an equal pedestal to an old property that has been awaiting renovation for a long time. In order to continue to stand up for a fair share of future years and survive any blow due to natural calamities or cause the minimum damage to the property due to such disasters, it has to have a strong base along with modern recast to it. The house, when introduced with the latest redesigns, offers greater strength and robustness to the base whereupon the house is fabricated while at the same time refreshes the structure with the most recent everyday expectations, in terms of technology laced with innovations, of the people living in it. Remodelling the house, amongst the many important and beneficial reasons, enhances the living conditions for the people living inside the house and helps the owners build a decent impression of themselves in their neighbourhood, these being the foremost reasons for renovating one's house.

For instance, the kitchens in houses are now being restructured in such a way so as to include in it chimneys. Chimneys help suck the lingering smell of the food and the smoke that emanates from usually grilled food, ensuring that the smell doesn't spread to the living area, bedrooms, or any other parts of the house and even outside the house through windows. Earlier without chimneys, all the members in the house had to forcibly absorb the smoke and heat of the cooked meal, making them nauseous and the kitchen walls had to endure oil. Now, all of this can be

[2] Parliament of India, "161st Report on Review of the Intellectual Property Rights Regime in India" (Department Related Parliamentary Standing Committee on Commerce, 2021).
[3] *Ibid.*

avoided by simply installing auto-clean chimneys in their houses. Similarly, if new legislation like resolving the patent disputes through the various methods of ADR, reduction of patent examination from 48 months to a sufficient period, and other such amendments have to be inserted in the statutes in order to save the statute from becoming ineffective and a mere piece of paper.

Obsolete legislation that has not been implemented for a long time, can put the country at risk and collapse the long-standing pillars of good governance. They may lead to a significant non-compliance of the legislation to work with the currently relevant laws and regulations. Further, those archaic legislations may not be able to throw enough focus on the new technologies resulting in inconsistent and outdated practices of the country,[4] which may sway away the foreign investors to participate and take interest in investment policies of that country. While the core elements of policies and procedures may stay the same the details should change according to industry standards, organizational needs, or legal requirements. In addition, policies should line up with the country's mission, vision, and values.[5]

[4] PowerDMS, https://resourcingedge.com/hr-services/the-importance-of-reviewing-policies-and-procedures/ (last visited Nov. 29, 2021).

[5] Kimberly D. Gray, *The importance of reviewing policies and procedures*, Resourcing Edge (Nov. 29, 2021, 20:46 PM), https://resourcingedge.com/hr-services/the-importance-of-reviewing-policies-and-procedures/.

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COPYRIGHT INFRINGEMENT IN CYBERSPACE: SCRUTINIZING THE PROSPECTIVE PROGRESSION

*Sarthak Sharma**

INTRODUCTION

The past century has witnessed various inventions that has changed the landscape of the world and has helped people perform their task with better efficiency and effectiveness. Either the invention of the computer, or the mobile phone, technological development has created a better platform to transform the lives of the people. But, among all, one invention that stands apart from every other invention is arguably the internet. The internet services has helped people form a better communication and enhanced lifestyle across the borders. Either buying of groceries, or availing medical services, everything is just a click away. Further, internet has provided an august platform for artists to showcase their talent and draw attention towards the innovative and insightful ideas of the people. But, looking towards the other side of the coin, the widespread use of internet has also created a grey market where a product or any material could be copied and replicated, thus compromising the originality and rights of the owner. The massive outreach of internet services has made an original product vulnerable as it can be illegally copied and used to bleed out revenue from the owner. For instance, a song uploaded by any singer could be copied and re-uploaded upon various other platforms. Not even restricting the fraud upon internet services, the song could be copied in hard disks or CDs and then sold to the people to create illegal revenue and damage the intellectual property rights of the owner of the song. Increase and development of technology has helped people live with a better lifestyle, where machines and technological advanced programs have enhanced the efficiency of their work, but it has further added fuel to the issue of infringement of copyright in the digital environment. Thus, an amicable solution needs to be adopted to stop the illicit

relation of internet and intellectual property rights, which dents the revenue of the owner and infringes its rights.

INFRINGEMENT OF COPYRIGHT OVER INTERNET

The internet has been a boon for many people, but a bane for copyright owners. Earlier, copyright infringement was afflicted by plagiarising the material of the owner, and then selling it at a lower rate in the market. This dented the revenue of the copyright owners as the plagiarised product might be sold for relatively lesser price than the original product, thus reducing the revenue of the owner. Not even printed materials, photographs and newspapers can be copied and sold in the grey market. But, as mentioned before, the introduction of internet has added much fuel to the already herculean problem. With as many as 4.66 billion or roughly 60 percent of the population of the globe active on the internet, copyright infringement has become more rampant than ever.[6] For instance, a song when uploaded on internet gains a lot of viewership during first few days of uploading it. But, copying and re-uploading of the song on other or same platforms can drastically deter the revenue which could have been generated from the legitimate means.[7] The following is just a narrow description of copyright infringement through internet, as modern forms of internet infringement can be through framing, linking, caching and many others. Among the modern type of online copyright infringement, framing and linking are the most prominent kind of infringement that harms the resources and revenue of the copyright owners.

WHAT IS FRAMING?

Framing is a process wherein the user is able to visit the contents of a particular website while it is framed to any other website. A website can be divided into several frames or sections, where information can be provided to the users. Framing is a common practise in website creation and content surfacing assisting in providing different kind of information to the user under on the same web page, but is paradoxical to the theory of copyright.[8] Supposedly, if A

[6] Joseph Johnson, *Global Digital Population as of January 2021*, Statista (Feb. 23, 2022, 01:15 PM), https://www.statista.com.
[7] Debbie Egel, *Copyright Infringement in the Music Industry*, Symphonic Blogs (Feb. 23, 2022, 03:45 PM), https://blog.symphonicdistribution.com.
[8] Lavanya, *The Concept of Framing*, Legal Service India (Feb. 25, 2022, 02:00PM), http://www.legalservicesindia.com.

develops a website dedicated to the availability of slots of covid vaccines in its neighbourhood, and in its website the information is provided to the user through a frame which connects it directly to the government portal. Now, the information provided to the user shall be through the government portal, but due to framing of the same it would be received to the user through the website of A. Though the process of framing is technologically gleaming as it provides different kinds of information to the user under the same web page, but the process hinders the user from visiting different web pages, thus depreciating the revenue of the web pages.

Framing is a common practise which is followed everywhere around the globe. The process is also not an impediment if permission of framed web pages is sought before being framed. While adjudicating the case of Washington Post Corporation v. Total News[9], the southern district court of New York struck down the practise of framing. In the present case, Total News, a website providing news to the user framed different news articles over its web pages without seeking the permission of the same. The court while dealing with the issue stated that the following was blatant infringement of copyright and must be prohibited to protect copyright owners.

WHAT IS LINKING?

There are several ways through which information can be transmitted to the user. Apart from framing, linking is one of the prominent ways of providing information to the user. While surfing through the internet one may come across hyperlink texts which transmit the user to any website or portal.[10] The following transmission is possible due to the process of linking. Linking can be of two types- surface linking and deep linking. Surface linking is providing the access of another webpage through the web page of the one, accessed by the user. Whereas, deep linking refers to providing direct access to the internal page of a website, through another web page. Surface linking is providing direct access to the web page but deep linking bypasses the web page and provides access straight away into the internal page of a website. Links are often highlighted or attractive texts appearing on the website which form a quintessential part of the internet services. They provide easy access to different source of information and put together the internet into an addictive and engaging platform.

[9] No. 97 Civ. 1190 (PKL).
[10] *Linking to Copyrighted Material*, Digital Media Law Project (Feb. 25, 2022, 07:20PM), https://www.dmlp.org/.

Though surface linking may not be considered a muddle as it only provides links to the web page of another websites, but deep linking complicates the issue as it transmits the user into the internal web page of another website. For instance, a user may look for cameras to buy on the internet.[11] While searching for it the user may come across several websites which offers information about the same. Now, surface linking of any of the website may take the user directly to the user to the page of the website offering information of different cameras, but deep linking the website shall take the user directly to a specific product or a specific set of product, bypassing the web page of the website offering information on cameras. The revenue over internet is availed by calculating the amount of traffic received over the website. Surface linking of a website shall not hinder the traffic received on the website; rather it shall help in increasing it. But deep linking a web page shall drastically hinder the traffic received on the website, thus impairing the revenue.[12]

Several countries has strictly dealt with the issue of deep linking where it has been frowned upon and termed illegal. While dealing with the case of Sky v Reddit, the Court of Session of European Union prohibited the use of deep linking. In the present case, Sky owned an art channel, whose links were provided by a user on Reddit.[13] Though Sky had itself uploaded the content online on its application, the court stated that the material was not free and open for use, since the app required the user to accept the terms and conditions of the app, and thereby access the material. Thus, providing links of the app over Reddit was blatant infringement of copyright of the material uploaded by Sky. The following was termed as infringement since the traffic or revenue which was supposed to be generated through the app, was first provided through Reddit. Thus, in a way, Reddit was diverting the traffic from their application to another, which legally should have been diverted provided to Sky. Further, in Warner & Sony Music v. TuneIn, the English Court of Appeal put forward that providing link of music to the public through radio channels was also infringement of copyright. In the particular case, Warner & Sony Music sued TuneIn, an online radio aggregator, as the latter was providing links of music to the users without any permission from Warner & Sony Music. The court stated that TuneIn should provide for license fees before providing links as though the people

[11] Himanshu Sharma, *Legality of Metag-ing, Linking and Framing*, Mondaq News Letters (Feb 26, 2022, 07:40 AM), https://www.mondaq.com.
[12] Richard Stim, Linking, *Framing and Inlining*, Nolo (Feb 26, 2022, 10:20AM) https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html.
[13] Sky UK Ltd. v. Alex Cherrie, Court of Session CSOH 36.

of UK were acquainted that the music of Warner & Sony were accessed through the links of TuneIn but, anyone from foreign country shall not be acquainted of the same, which would result in crippling the traffic and harming the generated revenue of Warner & Sony Music.[14] The following judgment was made on the lines that TuneIn was providing links of music and thus extracting revenue which belonged to Warner & Sony Music. The user used to access music through TuneIn and not from the official website of Warner & Sony Music, which ultimately reduced the traffic on the websites of Warner & Sony Music.

LIABILITY FOR INFRINGEMENT OF COPYRIGHT

The liability of infringement of copyright is also a major issue in online infringement. Reading section 14[15] and 51[16] of the Copyright Act concludes that reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public could amount to copyright violation. But ascertaining liability in an online copyright infringement is a tricky business since the information or the copyright work is not reproduced rather transmitted to the public through a link or a frame. Such as, in the case of framing the owner of the website never reproduces the copyrighted material available online nor produces any pirated version of the copyrighted information, rather it provides an invitation to visit the original website through the frames of its own website. In this scenario, the user is the only person who copies the product but is innocently unknown of this fact that the information is provided through different browsers.[17]

But, the process of framing might be a violation of copyright according to section 14(a) (vi) of the Act, as the following section mentions about the right of adaptation only to the owner of the copyrighted work. During framing, the original website's components are changed to the framed website, and hence the final components of the framed website are different from the parent, i.e. the framing website. Thus, difference or adaptation of the copyright product shall infringe the copyright of the owner. Not even statutory rights under Section 14, framing even

[14] [2019] 11 WLUK 6: LTL.
[15] Copyright Act, Section 14.
[16] Copyright Act, Section 51.
[17] Astrid Arnold, *Linking & Framing- When Does it Infringe Copyright*, Mondaq News Letter (Feb 26, 2022, 08: 00PM), https://www.mondaq.com.

compromises moral rights of the owner of the copyright. According to Section 57(1)[18], the author can claim ownership over its work, but framing compromises the ownership of the work as the user is never acquainted about the owner of the source of information. Unlike linking, where the URL of the website changes after browsing through the link, framing does not changes the URL of the website, thus it is hard to trace the owner of the information.

Similarly, the process of surface linking shall not be a concern for infringement of copyright, but deep linking needs to be addressed as it hinders the traffic of the website which results in loss of revenue to the website. Again, looking with the lens of Section 14 and 51 would portray deep linking not as reproducing any copyrighted work but as transmitting the information to the user. It is ultimately upon the discretion of the user to access the information and dive into the web of internet services. Despite the drawbacks, it would be worthwhile to mention that linking helps in engaging the user and communicating the copyrighted work to the people. As per Section 2(ff)[19] of the Copyright Act, communication to public refers to "making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member actually sees, hears or otherwise enjoys the work so made available." The following definition may be extended to linking as it helps in communicating information to the public through the means of display. But, the situation complicates during the process of deep linking as on one hand it is essential in dissemination of the information, but on another it infringes the copyright of the owner.[20]

The outcome of the judgment from UK and US makes it evident that the process of deep linking has been frowned upon as it deters the revenue of the owner of the website, but the situation is not clear in India. Though warning regarding copyright infringement can be added to the websites, but it shall be of no avail until the user is not aware of the online infringement. Further, realizing that the final consumption of the information is enjoyed by the user makes the situation even worse as the user is benefitted with quick and easy access to information, transmitted either through framing or linking. Even the present laws concerning copyright can be extended to prevent online infringement, but for that infringement needs to be addressed to the court. Since the user is not aware of the kind of infringement prevailing over the internet

[18] Copyright Act 1957, Section 57.
[19] Copyright Act 1957, Section 2.
[20] Raman Mittal, *Online Infringement Liability*, Vol. 46, Journal of Indian Law Institute, 288, 305-312 (2004).

only multinational companies with tonnes of turnovers address their concern to the court. In, India as the matter never reaches the court, the jurisprudence revolving around the present issue has not yet evolved. Also, such as framing and linking, there are a few other form of infringement such as caching and inlining which are yet not explored in detail by the judiciary or any other international forum. The continuous rise in technology also opens the gate for any other and new form of infringement which may harm the rights of the author. With the rapid development in technology, information can be transmitted over the internet through any other means. Perhaps, the recent development of metaverse proves that internet is a vast ocean with change as the only constant. With all these development of technologies, the ways in which infringement can be afflicted seems non exhaustive. Thus, the dilemma still covers the air over online infringement of copyright.

INTERNATIONAL CONVENTION VIS-A-VIS COPYRIGHT INFRINGEMENT

Several international conventions have been adopted to cater the issue of infringement of intellectual property. The protection of intellectual property rights is not only needed, but also a necessity. The original work of an author needs to be protected to prevent any kind of loss of revenue to the author and also to promote originality and creativity. But, the territorial nature of copyright law makes it difficult to prevent cross border infringement of copyright. Bilateral agreement and several regulations among countries needed to be strengthened to prevent any kind of cross border infringement to the author. Seeking a uniform system for preventing the same, Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) was adopted in 1886 which ensured that the rights of the authors were well protected in the signatory countries. Apart from Berne Convention, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) was also adopted in 1961. The two conventions revolved around the basic need of protecting the artistic work of the author.

With the rise in internet services, the entire world is now turned into a global village where a person can effectively communicate with another person, while both being miles apart. But, as established before, rise in internet services further triggered the rise in infringement of

copyright. Technological enhancement and increase in commercial development has further fuelled the already prevalent problem of online infringement of copyright. With the last amendment in the Berne Convention dating back to 1971, the conventions seem not only outdated but also futile as no regulation explicitly relates to infringement in the digital environment. Thus, two new treaties, i.e. WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) were enacted to culminate online infringement.

The two treaties enumerate several provisions from the Berne and Rome Convention, while also adding significant provisions to cater to the "digital agenda". Such as, the right of reproduction of work is incorporated as Article 1[21] in WCT and Article 7 and 11 in WPPT[22], where the same is derived from Article 9 in the Berne Convention. On the other hand, the WPPT provides for the same right of reproduction of the work as Article 7 and 11 of the Berne Convention. Though the scope and application of the right of reproduction of work is not explained in the treaties, but the statements rolled out in the conferences held makes it clear that the reproduction rights are also available in the digital environment. Apart from right of reproduction, the treaties also mentions about the right of transmission and distribution. One of the most quintessential features of the treaties is that it provides exemplary right of transmission of original work, explicitly to the author. The WCT, as well as the WPPT provides the right of transmission of work exclusively to the author, which was lacking in the Berne Convention. While the Berne Convention only catered to cinematographic works, Article 6(1) of WCT entrusted the right of distribution of the work only to the author. Further, Article 6(2)[23] also provides that rights of the distribution can be exhausted by the author in any legal and competent way. Thus, the treaties are fully equipped with different rights to protect the work of the author in digital environment.

[21] WIPO Copyright Treaty, Article 1.
[22] WIPO Performance & Phonograms Treaty, Article 7.
[23] WIPO Copyright Treaty, Article 6.

ISSUE OF JURISDICTION

Internet is a vast ocean of content and material which can be accessed from anywhere in the world. The penetration of internet services is increasing every day since as many as 4 lakh[24] new users are added each day to the captivating web of internet services. But, the vast ocean is even perilous as fraud and malpractices are prevalent and easier through internet. A person may commit a crime of copyright infringement in one country while accessing internet through another. Copyright infringement of a tangible material such as in books, newspapers or journals shall have no difficulty in deciding jurisdiction, but several issues might crop out while dealing with jurisdiction of copyright infringement. Firstly, issue might arise as where to file the suit, either in place where the copyrighted material has originated or the place where the material has been infringed. The common principle of law suggests that the suit is filed at a place where damage is afflicted, but this principle cannot be applied to digital environment as cross border shall make it impossible for an author to file a suit in another country. Even the Berne Convention in Article 5.1 directs the member countries to grant similar rights to foreign authors as are granted to the national authors[25], but the scenario changes altogether due to Article 5.2 as it mentions about the member country to protect the rights of the foreign author in case of any infringement, based upon the country's national laws. This again raises the dilemma about infringement of copyright as the country shall apply its own rules while dealing with infringement which might not be just to the foreign author. Even a slight difference in law between two countries can raise difficulties regarding remedy available for infringement.[26]

Secondly, conflict of laws among countries is major drawback in resolving copyright infringement as the laws might be different in different countries. For instance, the protection of a literary work granted to an author in India extends to the life span of the author plus 60 years, while in US and UK the following right extends to life span of the author plus 70 years.[27] Though the copyrights laws of the countries might be in consonance to the Berne Convention, but the intricacies of the respective laws might be different, which plunges the situation of online copyright infringement under deep waters. The WCT and WPPT adopted by the WIPO are regulations mentioning explicitly about the different types of right of the author that are

[24] Mahmudul Hasan, *Mobile & Internet Users in 2021*, The Daily Star (Feb. 27, 2022, 10: 25 AM), https://www.thedailystar.net,
[25] The Berne Convention for the Protection of Literary and Artistic Works, Article 5.
[26] S. S. Rana, *Internet and the Determination of Jurisdiction in the Case of Trade Mark Infringement*, Mondaq News Letter (Feb. 27, 2022, 11:50AM), https://www.mondaq.com/.
[27] Aniket Agarwal, *Deciphering Jurisdiction in Online IP Infringement*, SCC Blog (Feb. 27, 2022, 02:00 PM), https://www.scconline.com.

available to the author. But the major drawback is the non binding nature of these treaties. Though the two treaties and even the Berne Convention puts forward that national laws of the member country should be in consonance to the them, but the non binding nature of the treaties as well as the convention turn the situation back to square one.

Even if jurisdiction of dispute and conflict of law is settled, the financial expense and feasibility to sue an infringer seems dull as multinational companies and well established authors can file suit to protect their rights, but struggling authors and low revenue companies can hardly sue an infringer at an international forum. Though treaties and conventions are adopted with an aim to protect novel creating and promote originality in the cyber space, but the ground reality seems different as several problems still bug the digital environment and makes it impossible for an author to protect its work.

THE WAY AHEAD

It cannot be denied that rise in internet services has helped people across the world to grow in wealth and enhance their current lifestyle. Above all, the internet can be a great knowledge transmitter to help people gain more knowledge about their surroundings. But, the rise in internet services has undeniably pushed the copyright owners into a corner. As discussed above, online form of infringement cannot be ascertained and limited to a few because development in technology might outsmart the legal forums and leave the copyrights owners stranded. Even if an arduous effort is undertaken to enlist the different type of digital infringement, the problem might still not end then and there as the issue of the jurisdiction proves to be a huge hurdle in accessing justice. Nevertheless, even if the issue of jurisdiction is resolved and an international forum is established to put an end to the dispute, diverse laws of the countries and non binding nature of the treaties turns it unviable. Thus the following issues turns out to a never enduing loop where ultimately loss is inflicted to the owner of the copyright.

While looking towards the problem from a different lens, it is hard to digest that the ultimate infringer of information available on the cyber environment is the user. It is upon the discretion of the user to access information from the internet from legal or illegal means as it becomes impossible to prohibit infringement in spite of the several well thought and regulated conventions. Further, the governments all across the world should address the issue of online infringement by strengthening the copyright law and amalgamating it with the IT laws of the respective countries. For instance, in India the Information Technology Act, which was last amended in 2008 lacks any substance regarding cyber infringement. The following law should be in consonance with the copyright act so as to minimize any kind of infringement and promote creativity by protecting the rights of the copyright owners. Also, internet service platforms such Google and Youtube should strengthen their policies regarding piracy which shall drastically decrease infringement in the cyberspace.

The primary objective of internet was to provide access to data and information to people all across the globe. Either advancement of science and medicine, or enhancement of commerce, internet becomes the root catalyst, pumping every task undertaken. Undeniably the internet has been a tremendous tool of development for people around the globe, but the same benevolent tool has proved to be a headache for copyright owners. The incompetence of the

international regulations has further exposed the gruesome problem. But, appropriate efforts in the rights direction can help solving the problem and providing some relief to the copyright owners. Thus, collective effort of the government and the users should be put in to stop infringement of copyright in the digital environment, so as to promote creativity and novel work of the author.

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INTELLECTUAL PROPERTY AND SOCIAL MEDIA

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Ashanya Pandey

WHAT IS SOCIAL MEDIA?

Social media is a form of electronic communication and a collection of websites and applications that focuses on communication, interaction, content sharing, collaboration and many more. It is typically used for social interaction, access to news and decision making social media is globally accessible and mobile applications make such platforms easier to access. Social media is a tool used for sharing information locally as well as worldwide as well as to create and spread information. Social media can influence a company's brand exposure and customer reach through reviews, advertising and tactics of the market. Social media has become a necessary day-to-day activity for people in today's world.

RAPID GROWTH OF SOCIAL MEDIA

With the deep insertion of internet connectivity among people, social media uses are rapidly growing in India. As right to freedom and speech is guaranteed to all the citizens by the constitution of India, social media acts as a platform to express and share opinions as well as information around the world. The Indian population has reacted to social media like a knife through butter. An Indian on an average spends about 2.25 hours on social media daily. As per the data, the active social media users in India in the year 2021 are about 448 million due to deep penetration of internet connectivity among people.

India is the biggest social media platform after china. The most used social media platform by

the Indians in the year 2021 with 85.80% users enrolled IS YouTube. There are many people who have become big through YouTube. YouTube has the second biggest market in India after U.S.A. After YouTube the second most popular platform used in India is Facebook with 79% of users enrolled. Instagram is mostly used by young people and teenagers. Facebook, the parent company has paid $1 billion to buy Instagram. The few more problems that are popular in India are twitter (50.6% of enrolled users), LinkedIn (37.7% of enrolled users), Pinterest (34.3% of enrolled users) and reddit (22.1% of enrolled users).

The most favored and likely app used in India is WhatsApp. Facebook has also owned WhatsApp that acquires 79% of the country's total users. Facebook Messenger is the second most used app in India with 62% users. Third is snap chat that is popular amongst teenagers. Third is snap chat that is popular amongst teenagers with 33.7% users. Fourth is the recently banned app in 2021 i.e. Tik Tok with 31.5% users.

WHAT IS INTELLECTUAL PROPERTY

Intellectual property is an umbrella term which broadly categorizes intangible or non-physical assets that are the product of creativity of mind or intellect, such as idea, invention or process. The various types of intellectual property are:

- Patents: It is the temporary monopoly or authority which is granted to an inventor and which bars others from making, using or selling the invention for which the patent is sought after.
- Copyrights: It is the legal term used for the right of the creator over his/her original creative work.
- Trademarks: It is a type of intellectual property which consists of any unique symbol, design, word, slogan or a combination of all of the aforementioned, and which is used to represent a business or its products.
- Franchises: A franchise is a business where the owner licenses its operations—along with its products, branding, and knowledge—in exchange for a franchise fee.
- Trade Secrets: It the confidential information pertaining to a company's process or practice and which are not a matter of public knowledge.

INFRINGEMENT OF INTELLECTUAL PROPERTY ON SOCIAL MEDIA

Internet is easily accessible to people these days and has changed their lives. It is much easier for people to communicate these days than earlier. The convenience of communication has proportionately increased the abuse of medium of communication. Due to freedom of interaction, basically on social media, people have started posting false statement unnecessarily about a person or entity which affects their goodwill. However, such an act on social media is considered as "Trolls" that amounts to cyber defamation.

Any act which takes place on cyber space leads to cyber defamation. Cyber defamation is used when a person uses defamatory system against any person or entity on social networking site such as Facebook, Twitter, and Instagram etc. or sends messages or emails that contain defamatory content with aim of defaming him/her.

LAWS ON CYBER DEFAMATION IN INDIA

DEFAMATION

Criminal defamation

Defamation is defined under **section 449 of Indian Penal Code**[28] "*as whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputations concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person"*

Section 469 of IPC[29] deals with forgery for purpose of harming reputation. "*It says as whoever commits forgery, intending that the document or electronic record, forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to 3 years, and shall be liable to fine".*

[28] Indian penal code,1860
[29] Indian penal code,1860

Civil Defamation

The statements made must be false and must be without the consent of the alleged person. Monetary compensation can be claimed by the defendant against the plaintiff. Requirements for placing a successful defamation suit are:

1. The defamatory statement must be made. The statement must be made in such a manner that it harms the reputation of a person or class of persons by exposing them to hatred. The test shall be done and the degree of defamation shall be calculated from the eyes of a common man.
2. The statement made must purport a person and not made in general like all "Judges are corrupt" and cannot gain compensation for the same.
3. The statement must be either in oral or written form. If a letter has been sent to a person in different language and a third person illustrates the same and defamatory statements are written on the letter, it will amount to defamation. It is necessary for a third person to read it then only it amounts to defamation.

SMC PNEUMATICS (INDIA) PVT LTD v JOGESH KWATRA[30]

It is the first case of cyber defamation in India. An employee of the plaintiff's company started sending defamatory, derogatory, abusive, contumelious emails to his employees all over the world with an intention to defame the company and its director Mr. RK Malhotra. A suit was filed by the plaintiff seeking permanent injunction and restraining him from doing such frivolous acts. An ex-parte injunction was granted by the Delhi High Court to restrain public from sending defamatory and abusive emails to them and their subsidiaries.

SWAMI RAMDEV AND ANNE v FACEBOOK INC & ORS[31]

In this case, Pratibha Singh Judge ordered that all the defamatory statements that have been made against Baba Ramdev (yoga teacher) must be removed online without any territorial restrictions. It was stated by the court that if the statements and the content has been made and uploaded in India or on a computer device in India, the court exercises international jurisdiction to issue decisions worldwide.

[30] CS (OS) NO. 1279/2001
[31] CS (OS) 27/2019

But, appeal was filed by Facebook against the decision of Delhi High Court. The appeal was made though it was already known the people who had uploaded such content; there was no involvement of the applicant in the case. It was also controversial as Baba Ramdev did not show any prima facie evidence against the irrevocable loss. Facebook also believes that global seizure regulations are contrary to national sovereignty and the international community. This is because there is violation of many defamation laws across countries. Therefore, it was held that once defamatory content is uploaded from India is available globally; access to such content should be blocked world-wide and not just in India.

POSITION IN OTHER COUNTRIES

Defamation laws vary from countries to countries, states to states, provinces to provinces. Therefore, plaintiff gets a luxury of 'forum shopping' or choosing the most favorable jurisdiction to him/her. In United States 75% of people file a case of defamation in state courts and rest 25% file it in federal courts. 156 countries (80%) have enabled cyber legislation: Europe has the highest adoption rate i.e.91% and Africa the lowest (72%). The evolvement of cybercrime is a significant challenge for law enforcement agencies and prosecutors especially for cross- border enforcement.

SERAFIN v MALKIEWICZ & ORS[32]

There was an article published in the year 2015 as there was a misuse of private information. It was said by the UK Supreme Court that provided guidance of section 4 of the defamation act 2020, the public interest defense. There was also ordering a full trial in the case concluding that "the justice system has failed both the sides". With "deep regret" and a degree of embarrassment in relation to respected colleagues in the court of appeal.

GUBAREV v ORBIS BUSINESS INTELLIGENCE LTD.[33]

A publication of the article Buzz feed created a defamation trial and the claimants took action against The Democratic Party leadership. It was stated by the court that the defendant was not held liable for the publication and there was an inform case comment.

[32] (2020) 1 WLR 2455
[33] (2020) EWHC 2912 (QB)

PATENTS

What is a patent?

A patent is a privilege provided to the inventor to restrict them from copying, using, selling or importing the invention without the permission of the inventor. An invention can either be a product or a process that provides a novel technical solution to a problem. A patent should be wholly novel to be issued, as if it is already known to the public in any way, the grant may be denied. People may accidentally disclose their invention on social media such as Facebook and Instagram post or a YouTube blog. As a result it becomes a prior art, and when it is viewed by the authorities, it receives an objection. The simplest way to avoid this is to stop sharing and disclosing the inventions on social media.

Patent protection in India

Replacing the Indian patents and designs act 1911, the patents act 1970, along with the patent rules1972, came into force on 20th April 1972. *This patents act was largely based on the recommendations of Ayyangar committee report which was headed by Justice N. Rajagopala ayyangar.* One of the steps taken by the Indian government was to become the member of the *Trade related intellectual property rights (TRIPS) system*.

Section 2(1) (j) of the patents act[34] *defines the word 'invention' as:*

"Invention" means a new product or process involving an inventive step and capable of industrial application.

And the term '*new invention' under section 2(1) (l)*[35] as:

"*new invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the act.*

Inventions that is eligible for patent protection under the Indian law qualities. The first key element that needs to be qualified is novelty. If the invention has been sold in India or outside India are not eligible for qualification. Other obligatory elements are utility, non-obviousness or usefulness.

[34] Indian patents act,1970
[35] Indian patents act,1970

The exceptions or innovations that are not eligible for patent protection in India are:

- Medicinal processes
- Agricultural methods
- Discoveries of new uses for existing objects
- Frivolous inventions

MERCK SHARP AND DOHME CORPORATION AND ANR v. YMS LABORATORIES PVT. LTD[36].

A suit was filed by the plaintiff, owner of patents holding sitagliptin and its derivative salts seeking an infringement suit against defendant. The plaintiffs contended for Ad injunction during the pendency. An ex-parte interim injunction was granted to the plaintiff. The plaintiff showed that defendant was planning to launch an infringing product under the brand 'stallip-m' which enabled ex-parte injunction.

BAYOR CORPORATION v. UNION OF INDIA[37]

In the year 2008 plaintiff (Bayor Corporation) for a drug named 'sorafenib tosylate' a patent was granted to the plaintiff by the Indian patent office. The drug is used for the treatment of kidney cancer and liver. On March 2012 first compulsory license was granted to NATCO Pharma Pvt. Ltd by the Indian Patent House for the generic version that is patented by Bayor Corporation was selling it for Rs. 22.80 lakh, NATCO promised to sell it for Rs. 8,800. Plaintiff move to the intellectual property appellate boards for a stay on the compulsory license granted to the NATCO pharma stating that it was invalid illegal and unsustainable. However IPAB rejects the appeal as it offered drugs comparatively on lower prices. Plaintiff went to Bombay high court challenging the order. But the high court dismissed the petition stating that public interest should be prioritized at large. It was held by the High Court that the power to make rules lies with the central government illustrated in section 156 of the Indian Patent act. It was also stated by the PGCI that the sale of drug patented by someone else in also not allowed and is incorrect as per section 90 of the patents act. The DGCI can reasonably allow the commercialization of generic drugs even after they are patented. Therefore, it was held by the court that acceptance of the generic drugs would not amount to infringement of the patent.

[36] CIVIL SUIT NO. 823/2018
[37] 162 (2009) DLT 371

Intellectual property rights around the globe

Patents can be granted anywhere in the world whether internationally or in a single country. The head of the technology management and intellectual property at daimter Christian hahner said that patenting a product internationally is an expensive process. To protect the patent from being copied and to defend the patent in the court it is very important for the businesses to nationalize the patent, to make valid in other countries. For example Microsoft does not patent its software because doing so will reveal their source code.

There are many social media apps and technologies that are patented. One such example is of twitter, a patent held on a method of managing and detecting group. On an estimate, more than thirty thousand patents have been filed in USA relating to social networking technologies and methods.

LIMELIGHT NETWORKS, INC v. AKAMAI TECHNOLOGIES[38]

In this case, it was held that there is no liability for inducing patent infringement under 35 USC 27 1 (b) unless there is an actual infringement under 35 USS 27 1 (a) by the party. In this case, the federal circuit had applied its muniauction decision relating to split infringement, and it was founded out that none of the parties have performed the full process to ensure claim. Furthermore, there was no direct infringement. The Supreme Court overturned the federal circuit then there could be infringement under section 271(b) inspite of the lack of direct infringement.

EGYPTIAN GODDESS, INC v. SWISA[39]

It was held in this case that there was no requirement of novelty test to find out that there was any infringement of the design patent. Rather court believes more in the observers test. It was also explained by the court, to provide a verbal description of the scope of design patent by the district court.

[38] INC (S.C.T. 2014)
[39] INC (FED. CIR. 2008)

COPYRIGHT

Copyright, also known as 'Author's Right' is the legal term used for the right of the creator over his/her original creative work. It is a type of intellectual property that aims at protecting the work of a creator from being used without his/her due permission. In simple terms, copyright law gives the original creator of a creative work, the exclusive rights to make duplicate of the work, produce derivate contents, and to make the work publicly available. The 'creative work' can include a plethora of works like literary works, music, software, films, paintings, technology etc. It is important to note that copyright protection covers only expressions, and not ideas, methods, procedures or mathematical concepts as such.

There are two types of copyright available to the creator:

- Economic rights
- Moral rights

Economic rights enable the creator to gain financial benefits from the use of his/her work, whereas moral rights are special rights that pertain to the non-economic rights of the creator such as paternity rights and integrity rights.

Doctrine of fair use

The Doctrine of Fair Use allows the use any copyrighted work without taking prior permission from the owner of that copyright. Fair use of any work is for a limited and transformative purpose. There is a very thin line between fair use and infringement. The four factors that determine whether a copied work amounts to fair use are:

- Purpose of use
- Nature of original material being copied
- Substantiality or amount of portion copied
- Effect of the use on the authentic work

BLACKWOOD AND SONS Ltd. vs. A.N. PARASURAMAN[40]

In the present case, the Madras High Court stated that the concept of "fair use" has a two-fold meaning. In order for it to qualify as unfair usage, there must be an intention to compete with the owner of the copyright, and gain profits from the same. Unless the infringer had any mala fide intention, the act would amount to fair use.

[40] AIR 1959 Mad 410

In recent times, and more so since the advent of the Covid-19 pandemic, social media has become one of the primary method of communication. There are various platforms such as Instagram, Facebook, Twitter, WhatsApp etc. where contents, expressions, ideas in various forms, are shared with the public at large. Due to the vast reach and influence of social media, many businesses rely heavily on it for the advertising of their products. However, this easy availability to almost every person, could lead to the unauthorized misuse of the creative work if the creator is not vigilant. One would argue that the presence of any creative work a social media platform itself means that the creator wants it to be used by the public at large, but that is not the case. The content may be easier to copy but it is still protected by copyright and copying it without giving attribution to the creator would amount to infringement.

SOCIAL MEDIA PLATFORMS AND THEIR POLICY REGARDING COPYRIGHT

Every social networking site has certain terms and conditions of service which their users have to comply with. While uploading their original work on social media platform, the creators have to be careful as putting the content on any platform in the first place can amount to granting licence to the social media site to use it and for the public to view it.

Facebook and copyright

Facebook is a social networking site which easily helps us in connecting with friends, family and people all over the world via messages, post, sharing videos etc. Facebook, in its Terms of Services and Community Standards, states that, *"you can only post content to Facebook that doesn't violate someone else's intellectual property rights. The best way to help make sure that what you post to Facebook doesn't violate copyright law is to only post content that you've created yourself".* Facebook also states that the creator must give them (Facebook), the license to use their content: *"...you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content."*

Certain users very frequently infringe the copyright policy. For such users, Facebook has a 'Repeat Infringer Policy'. This policy gives Facebook the authority to limit some features or disable the user's profile, page, or group in case he/she violated copyright policy frequently.

FAIRMOUNT HOTELS PVT. LTD. vs. BHUPENDER SINGH CS (COMM)[41]

In 2015, a conflict arose when the defendant, Mr. Bhupender Singh posted pictures of the plaintiff's hotel on his (defendant's) Facebook page without takin prior permission from the plaintiff. Due to this, the plaintiff filed a suit of copyright infringement against the plaintiff before the Delhi High Court. The plaintiff submitted that the defendant was his employee in the past and after leaving his service, had started his own line of hotels in Manali. The plaintiff further submitted that the photos of his hotel was being used for the promotion of defendant's new hotel. After putting into consideration, all the submissions made by both parties to the

[41] 111/2018 & I.A. 17922/2015 AND 1818/2016

suit, as well as the financial status of the Defendant, the Hon'ble High Court of Delhi granted a permanent injunction against the misuse of the photos by the Defendant and ordered a direction of 50,000 INR cost to be paid to the Plaintiff.

Twitter and copyright

Twitter is a microblogging and social networking site of American origin, where registered people communicate with each other in the form of shot messages called "tweets". Twitter's Copyright Policy state that, *"Twitter respects the intellectual property rights of others and expects users of the Services to do the same. We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us."*

Twitter reserves the right to remove any content alleged to be infringing copyright, without prior notice, at the company's sole discretion, and without liability to the user. In addition to this, Twitter also reserves the authority to terminate a user's account if the user is a repeat infringer.

Pinterest and copyright

Pinterest is an image sharing social media service that allows users to share, and discover new interests by posting (known as 'pinning') images or videos to their own or others' boards (i.e. a collection of 'pins,' usually with a common theme) and browsing what other users have pinned.

According to Pinterest's Terms of Service, *"You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, save, modify, create derivative works, perform, and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing, and using Pinterest. Nothing in these Terms restricts other legal rights Pinterest may have to User Content, for example under other licenses. We reserve the right to remove or modify User Content, or change the way it's used in Pinterest, for any reason. This includes User Content that we believe violates these Terms, our Community Guidelines, or any other policies."* Anything that is posted on Pinterest is termed as 'User Content' and the creator retains all rights and is solely responsible for the user content.

PROTECTION OF CONTENT ON SOCIAL MEDIA

Claiming ownership of a work does not solely deter a person from using it without permission. Intellectual property theft, though punishable by court of law, is very common. The easiest way to protect intellectual property from being misused on social media is to not put it up there in the first place. However, if it is absolutely necessary to put up an original work on a social media site, the following steps can be followed to ensure that it is not misused:

- Creating a watermark
- Adding a copyright notice
- Using a Digital Millennium Copyright Act (DCMA) badge

The creator must be vigilant to keep track of possible misuse of his/her work and be quick to file complaints. The best way to file a complaint is to use the DMCA takedown notice. This process allows the original creator of any content to send the notice, in a specific format, to the Internet Service Provider (web host) of the website that is violating the copyright. The ISP then removes the misused copy and notifies the website owner.

TRADEMARK

Trademark is a type of intellectual property which consists of any unique symbol, design, word, slogan or a combination of all of the aforementioned, and which is used to represent a business or its products. Trademarks are unique identifying attribute which means that no two business or products can have the same trademark. A trademark is basically used for the purpose of identifying the source of products or services, providing legal protection for the brand and guarding it against counterfeit or fraud. Unlike patents which are granted for 20 years, trademarks once registered forever remains with the business or product registering it.

Trademarks may or may not be registered, however, it is advised to register the trademark because a registered trademark provides more gives more rights and protection than an unregistered one. A person or company becomes the owner of the trademark as soon as they start using it with their products or services, the rights accompanying unregistered trademark are limited and are applicable in a narrow geographic zone only.

Trademarks are used for the following purposes:

- Identifying the origin and owner of goods and services
- Advertisement of goods and services
- Promoting market of the goods and thus stimulating their purchase

Pros of registering a trademark

The following are the advantages of having a registered trademark:

- It gives the owner the exclusive right to use the brand.
- Provides legal protection against fraud or misuse or counterfeit of the trademark by any other business
- Gives the status of "brand" to the goods or services

Signs of trademark

One of the following three signs are used by companies who have claimed trademarks:

- ™ - This is the symbol of unregistered trademark but nevertheless alerts competitors that symbol or phrase has been claimed
- ® - This symbol denotes that a trademark has been registered. Only companies that have their trademarks registered can use this symbol.
- ℠ - This is the service mark logo and is used by companies that sell services, not products

APPLE CORPS LTD. V. APPLE COMPUTER, INC[42]

This case witnessed the decade's long battle for the trademark "apple". Apple Corp was founded by the Beatles 8 years before Steve Jobs established Apple Computer. In 1991, both the businesses entered into an agreement that Jobs's apple would remain limited to computing, software, telecommunication and data processing whereas Apple Corps would deal in the music business. However, in 2001, when Apple Computer launched 'iTunes', a music playback software, they were sued by the Beatles claiming that it was a breach of their 1991 agreement. The case was finally resolved when Steve Jobs purchased the trademark from the Beatles and sublet them back.

[42] [2006] EWHC 996 (Ch.)

COCA-COLA COMPANY Vs. BISLRI INTERNATIONAL PVT. LTD.[43]

This case is popularly known as the 'Maaza War'. In the present case, the defendant, Bisleri International Pvt. Ltd., by an agreement, had sold and assigned the trade mark MAAZA to Coca-Cola including formulation rights, know-how, intellectual property rights, goodwill etc for India only with respect to a mango fruit drink known as MAAZA, and immediately after filed a trademark application for the same in Turkey. It was held by the courts that since the rights over the trademark were completely assigned to Coca-Cola, Bisleri has no authority to use the trademark in or outside India.

CADBURY LTD. AND 2 V. ITC LTD[44]

In April, 2005, Cadbury filed a case against ITC when it started marketing 'Eclairs' with the Candyman trademark. ITC, in its defence said that the trademark has not been used by Cadbury since 1994. It was observed that Cadbury had registered three trademarks in India in 1974 that included Eclairs (Chocolate Eclairs, Orange Flavoured Chocolate Eclairs, and Chocolate Eclairs Pop), but none of these were ever used. After more than a decade in court, the case was finally decided in the favour of ITC on account of "non-use". Section 47 of the Trademarks Act, 1999 states that a trademark can be removed by IPAB on the ground of non-use or if there has been no proof of its use for 5 continuous years from the date of application for registration of the trademark.

Trademark infringement on social media occurs in many ways. Many times we see sites or pages selling counterfeit products or fake products under the guise of the original trademark. This majorly happens with makeup brand, clothes brand etc. Another example is that of cyber-squatting where a user registers a fake account name that involves a famous trademark.

TRADE SECRETS

Trade secrets, one of the many intellectual property rights are crucial and valuable for company's growth and sometimes for its survival. Many multinational companies want to protect their companies by the means of Trade secrets. Some of these companies are KFC,

[43] [Manu/DE/2698/2009]

[44] on 20 July, 2005

Dominos, Coke, Microsoft, etc. This is because the concept of IPR is based on disclosure and protection to IPR is given for a certain period of time or till the date of expiry. After the expiry sate, the information is available in the public domain and no further benefits can be derived by the owners from such innovations. On the other hand, the trade secrets are based on 'secrecy'. In other words it can be said that as long the companies are able to protect and keep their innovation as a secret it can enjoy the exclusive rights provided for their innovations.

What is a trade secret?

"A trade secret simply refers to any data or information relating to the business which is not generally known to the public and reasonable attempts has been made to keep the information as secret and confidential"

Remote workers might have copies of client lists and other protected information on home computers which have less securities than other company networks and they might share their personal storage with other people, inadvertently exposing the personal information of the people. **To secure data a person must**:

- Establishing home security measures, like password protection (internal policies), locking periods for electronic devices, no sharing personal electronic storage devices with no-employees of the company.
- Limiting the access of trade secrets to employees.
- Assisting employees in confidentiality of the information.

Trade secrets in India are mainly protected through contract law. *Section 27*[45] *of the Indian contract law, 1872, provides remedy and it restricts a person from disclosing any information which he acquires at the time of employment or through a contract, but in this there is no provision for criminal remedy.*

The party whose trade secrets have been infringed may file a suit of injunction against the wrongdoer under the Specific relief act, 1877.

NIRANJAN SHANKAR GOLIKARI v. THE CENTURY SPINNING AND MANUFACTURING

[45] Indian contract act,1872

CO. LTD[46].

In this case the defendant was only appointed for five years on the basis that he shall not service anywhere else after he left his service earlier. Later he applied in some other workplace and started working there as he was paid more. It was further observed by the Supreme Court that the information that he has acquired in his last service in the respondent's office is different and he is against on disclosing the information to the rival company which requires protection. The Supreme Court held that an injunction to enforce negative contract, which is restricted as to time, can be issued in the order to protect employer's interest.

BURLINGTON HOME SHOPPING PVT. LTD. v. CHIBBER & ANR,[47]

It was held by the Delhi high court that there is a thin line between copy infringement and trade secret violation where it comes to lilaking customer's lists or compilation of business data. It was also further said by the court that Trade secret protects the underlying data whereas expression is protected by the copyright. However, in practice these two elements often have so much coverage that any infringement of copyright may also harm the secrets of business.

Trade secrets across countries

It is very important for the owners to protect the trade secrets of their company by imposing special procedures such as technical as well as legal security measures. The reason for the dispute that arises is when the former employees of the company leave to work with the competitor organization and are suspected to share the valuable and confidential information with the employees of that company. For this situation the legal protections that are used are non-disclosure agreements (NDAs), work-for-hire and non-compete clauses. In other words, in order to sign agreements of joining another organization the employer has to sign the agreements stating that the valuable and confidential information will not be shared.

As a company can protect its secrets through legal security measures it creates a perpetual monopoly and does not expire like patents or copyright. The lack of formal protection that is associated with the intellectual property however means that a third party is not bound to sign the agreement and is not prevented from using the secret information, such as through reverse engineering. The information regarding the trade secrets is shared only with few trusted

[46] AIR 1967 SC 1098

[47] 1995 PTC (15) 278

individuals.

QUALCOMM INCORPORATED v. APPLE INC AND DOES[48]

Apple keeps involving itself in legal disputes. It was alleged that apple have stolen the trade secrets of the company QUALCOMM and has shared it with Intel Corporation as the codes and the sources were accessible by the Apple. Qualcomm claimed that apple did so to preserve the quality of the chips. Apple purchases but changed the supplier from QUALCOMM to Intel Corporation for their new iPhone. A complaint was filed saying apple has breached a software-licensing contract by sharing confidential details to engineers at Intel Corporation. The law suit is still scheduled to be heard.

WHITMAR PUBLICATIONS LTD. v. GAMAGE[49]

The London High court granted injunction and restricted the use of LinkedIn group contacts created in employee's employment. The employees secretly collected the information while they were still employed and used them in setting up a competing business.

[48] 1 THROUGH 25(Supreme Court of state of California)

[49] [20B] EWHC 1881

CONCLUSION

It is safe to say that we live in the age of internet where everything is just a click away. However, it is our responsibility that this click is always for the better for ourselves and the public at large. The easy availability of everything on the internet makes some people prone to misusing them. Same is the case with our non-tangible assets or intellectual property. Creators, businesses all around the world now take to social media for promoting their products and business. Due to the encompassing nature of sharing on social media, it can be difficult for intellectual property owners to keep track of any infringements or violations. When they do, however, the laws can be utilised to restrict sharing or terminate any copyright, trademark, or patent infringement. Intellectual property protection gives the owner the ability to make complaints, remove content, seek compensation, file lawsuits, and much more.

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INTELLECTUAL PROPERTY RIGHTS AND HEALTH: ISSUES OF ACCESS AND PRICING OF MEDICINES

*Meghna Biswas**

ABSTRACT

Health is the greatest possession that an individual acquires. Whenever a person is denied a right to health, it becomes an infringement of his/her fundamental right. The research paper seeks to examine that times when right to health is often denied to a section of society because of the reasons of high pricing of medicines. Intellectual property right is a legal right that is given to a person for his creativity or invention. One of such intellectual property right is Patent. A patent right is given to an inventor of a particular product and is considered as one the important intellectual property rights as it aims to promote innovation and invention in a country. The pharmaceutical medicines or drugs are the subject matter of patenting and thus, it becomes difficult for normal public to access the essential medicines at reasonable prices. The reason behind this is the monopoly that is created among the pharmaceutical companies due to the grant of patent to their product and process. The research paper takes a dig into various issues of access to medicines and over pricing of the same that arises because of patenting. The paper then seeks to determine the challenges faced by the poor section of the society. To sum up, the research paper concludes that the patent system will benefit greatly and serve the technological and economic advantages, only after the negative impact of the patent system is properly assessed.

Keywords: *Patent, pharmaceutical drugs, access to medicines, intellectual property rights, overpriced medicines.*

INTELLECTUAL PROPERTY RIGHTS

Legally speaking, there are two broad categories of Properties. One is the tangible property and the other is intangible property. A tangible property is a kind of property that physically exists but intangible property are the properties that lacks physical substance. The denomination 'Intellectual Property' usually comes under the category of intangible properties. The reason being that an Intellectual Property is in a general sense, a creation and invention of a human mind. The word Intellectual Property is a combination of two very generic terms. One is Intellectual which means the ability to think and understand ideas at a high level, whereas on the contrary another term is the property which means a thing that belongs to somebody. This collectively provides us a definition of Intellectual Property which means something which is created with the help of a human intellect. A huge amount of effort, time, and skill is put in by an individual to create and invent something new and distinct. And this is the reason why the concept of Intellectual Property has gained enormous popularity. As there are some rights that are entrusted in other property owners, similarly, there are a number of rights that are bestowed in an Intellectual property owner. These rights are the Intellectual Property rights. Intellectual Property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons[50]. On the basis of the creation of human mind, following are the different types of Intellectual Property rights-

A. Copyrights

Copyright can be defined as an exclusive right granted by law to the author of a work to disclose it as his own creation, to reproduce it and to distribute or disseminate it to the public in any manner or by any means and also to authorize others to use the work in specific ways.[51] In simple terms, a copyright is a kind of intellectual property right that is given to a creator of any literary or artistic works. In India, the term Copyright is defined under Section 14 of the Copyright Act, 1957, which provides a long list of work which can be subjected to copyright. A copyright can be obtained for musical works,

[50] *Understanding Copyright Laws: Infringement, Protection and Exceptions*. Available from: https://www.researchgate.net/publication/301890434_Understanding_Copyright_Laws_Infringement_Protection_and_Exceptions [accessed Jan 26 2022].

[51] Asherry Brian Magalla, The true meaning of copyright (2015), Intellectual Property and Development of Science and Technology, available from: https://www.researchgate.net/publication/283015654_THE_TRUE_MEANING_OF_COPYRIGHT [Accessed Jan 26 2022]

cinematographic works, artistic drawings, paintings, novels, books, architecture, dramatic works etc. The creator of such work is termed as the true owner of the copyright. For the owner to obtain a copyright, it is essential that he converts his ideas into a tangible form. Only then he can get his creation protected otherwise not. The purpose of the copyright is to secure and reward the general benefits i.e. labour of authors on the produced work. It encourages the authors to produce and proceed with more works on continual basis.[52]

B. Trademarks

A trademark as the name itself suggests is a mark that is used in the trade. The object of the trade mark is to make the goods of a manufacturer or trader known to the public as his and thereby enable him to secure in course of time such profits as may accrue from the reputation which he may build up for his goods by superior skill, efforts and enterprise.[53] This is a category of intellectual property right which vests rights in the trademark users so that their mark is differentiated in the market and based on which are consumers are attracted and rely over such manufacturers. A trademark can be used for the benefit of the business. The concept of trademarks and the law governing the use thereof owe their origin to business competition, practice and custom.[54] Trademarks can be a name, number, logo, coined term, colors or combination of these an d could be the texture or shape of the goods too.[55] Trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging and combination of colours.[56] A trademark is granted for a term of 10 years.

C. Industrial Design

The creative activity of achieving an ornamental or aesthetic appearance of mass produced products or articles is covered under industrial design. The design can be expressed either

[52]Understanding Copyright Laws: Infringement, Protection and Exceptions. Available from: https://www.researchgate.net/publication/301890434_Understanding_Copyright_Laws_Infringement_Protection_and_Exceptions [accessed Jan 26 2022].

[53] Chakraborty, Rahul, Growth of Intellectual Property Law and Trade Marks (January 31, 2009). Available at SSRN: https://ssrn.com/abstract=1335874 [accessed Jan 26 2022].

[54] Ibid.

[55] Geejo Francis, Law of Trademarks in India (2011), SSRN Electronic Journal, available from: http://dx.doi.org/10.2139/ssrn.1850364 [accessed Jan 26 2022].

[56] Section 7, Trademark Act, 1999, India.

by two dimensional or by three dimensional forms.[57] An industrial must be new or original for the purpose of getting protection under the category of intellectual property rights. 'design' means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.[58]

D. Geographical indication

Another type of Intellectual Property Right is a Geographical indication which helps a consumer to know that a particular product derives from a specific region or geographical area. In simple terms, by geographical indication, one can clearly and easily differentiate between the qualities of the products based on their land of origin. For a geographical Indication to be protected as an Intellectual Property right, it is important for an individual to establish a nexus between the product and the region. A geographical Indication tag is often granted for products such as handicrafts, foodstuffs, wines, alcoholic beverages etc.

E. Patent

A patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention.[59] A patent is a document that is given by the Government of India to any inventor so that his invention is protected from any unauthorized usage.

[57] Lalit Jajpura, Bhupinder Singh, Rajkishore Nayak, An Introduction to Intellectual Property Rights and their importance in India Context (2016), Journal of Intellectual Property Rights, Vol 22, pp32-41, available from: http://docs.manupatra.in/newsline/articles/Upload/41C26FED-7AFE-40EA-8736-4E6C516917AE.pdf [accessed Jan 27 2022].

[58] Section 2, Design Act, 2000, India.

[59] Will Kenton, Patent (updated April 2021), Investopedia, available from: https://www.investopedia.com/terms/p/patent.asp#:~:text=A%20patent%20is%20the%20granting,comprehensive%20disclosure%20of%20the%20invention [accessed Jan 27 2022].

PATENTING IN PHARMACEUTICAL INDUSTRY

As there had always been a technological as well as industrial advancements in the country, the concept of Patent also has simultaneously evolved with time. One of the major industries that is enjoying the benefits and the right that comes along with Patent, are the Pharmaceuticals. This is so because each day a new drug is being introduced in the market and the Patent right is given to the same. Patents are granted to those inventions which are new, is an inventive step and is capable of applying in the Industries. A Patent provides an exclusive right to the Patentee to use, sell, re-sell, license its products for a time period of 20 years. It is upon the patentee how he uses his invention in order to gain economic and financial growth. The Pharma Industry is one such example. There is a wide range of Pharmaceutical Patents in India namely, Drug Compound Patent, Composition Patent, Synergistic Combination Patent, Technology Patents, Polymorph patent, Process Patent, Biotechnology Patent etc. The Patent Act, 1970 sanctions pharmaceutical products to be patented in India, if it qualifies all the criteria required to get itself patented. A pharmaceutical industry is an important one, so much for its economic size as for the benefit that it delivers to users of its product.[60] Patents contribute to roughly 80% of the overall revenue of pharmaceutical companies and obtaining patent protection is important to safeguard the innovative approaches used by pharma companies.[61] Drug patents help recoup investments that are incurred during the research and development stage. Also, drug patents can secure against infringement cases, as competitors can easily duplicate the manufacturing of a drug. Drug patents help raise venture capital, which thus, improves the overall economic growth of companies operating in this industry.[62]

An invention to be protected under the Patent laws has to fulfil unquestionable criteria. An invention should follow the rule of Novelty. Novelty in general sense means any product which is new and usual. So, for an invention to obtain a patent, the first condition is that the invention is completely new and original, meaning that the invention is something which

[60] Caves, R. E., Whinston, M. D., Hurwitz, M. A., Pakes, A., & Temin, P. (1991). Patent Expiration, Entry, and Competition in the U.S. Pharmaceutical Industry. Brookings Papers on Economic Activity. Microeconomics, *1991*, 1–66. https://doi.org/10.2307/2534790

[61] Shilpi Kumari, Patents in Pharmaceutical industry (2020), S&A law offices, available from: https://www.mondaq.com/india/patent/900672/patents-in-pharmaceutical-industry#:~:text=Patents%20contribute%20to%20roughly%2080,the%20research%20and%20development%20stage [accessed Jan 27 2022]

[62] Ibid.

have never been disclosed and have not been used earlier. The second important condition to be fulfilled is that the invention is non-obvious. This means, the invention is such that in an ordinary circumstance, any skilled person cannot recreate the same. So, in order to match with the second important eligibility criteria, the invention is a whole new inventive step.

The last element which is required to obtain a patent protection is that the invention is capable of being used in the industries. There shall be an industrial application of the invention. When an invention qualifies all the above stated criteria, then only a product or an invention has the right to apply for patent protection, otherwise the granting of protection is rejected. Any pharmaceutical drug or medicine, also, have to undergo the same eligibility test. After enacting, Patent Act, 1970 by the Indian parliament, it became easier for the pharmaceutical companies to get their medicines patented. Not only the process patent, but the product patent was also one of the chief characteristics of the act. By providing Patenting in pharmaceutical industry, has helped the Indian medicine company to grow and develop at a large scale. The benefits arising out of Patenting for pharmaceutical industry can be enlisted as follows-

a) Patent stimulates invention. As one can protect its invention, so they can concentrate on the making of new and innovative drugs which is obviously good for the public health.
b) Patents on medicines are expected to give social benefits by inducing more innovations.
c) Patents helps to provide incentives to the companies.
d) Patent on medicines and pharmaceutical drugs aids to higher economic growth in the country.

In order to avoid risks prevailing in the market, the patent owner or the inventor can provide license to an individual, company or companies, probably to those who have a better knowledge of the competitions in a global market. Compulsory licensing is also one of the kinds of patent licensing. In case of Compulsory licensing the government grants permission to the companies to make, use and sell the patented product, without the prior permission of the patent owner. This is done for public welfare. For pharmaceutical medicines and drugs, the government grants compulsory license to the pharma companies, so that the essential drugs are made available to the public at large. Compulsory license can be provided to the

companies, only if the three conditions are fulfilled. The first and the foremost condition is that there is a surplus demand of the patented product. The second condition is that the patented product is not available to the general public and the last condition is that the patented product is not from within the territory of the country where such demand is made. Whenever, such circumstances arise in a country, the government can provide compulsory license to the companies. Usually such category of license is reserved by the government for the pharmaceutical products.

RIGHT TO HEALTH IN INDIA

Right to health means that any individual residing in the country should have an access to the health care system. Right to health is treated as one of the important human rights. Human rights are the natural rights that are available to them merely for the reason that they have been born as a human being on this planet. These are the basic rights which every human being will have from the time they are born till the time they die. Right to health, also, comprises the same category of right, which refers to that every individual will have a right to access the health care services in the time of emergencies and otherwise. The concern of right to health is not a national issue but this has been a topic of relevance at the international level as well. Evidently, the World Health Organization, speaks by the way of its preamble that each individual has a fundamental right to the enjoyment of the highest attainable standard of health. This means that the WHO also makes it very clear that right to health is not only a basic human right but it shall be treated as one of the primary fundamental rights too. Health is a state of complete physical, mental and social well-being and not merely the absence of the disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.[63]

Right to health at the international levels

The right to health is entrenched in a series of international treaties as well as numerous national constitutions. A major international standard-setting instrument is the International

[63] Constitution of World Health Organization (WHO), available from: https://www.who.int/governance/eb/who_constitution_en.pdf [accessed Jan 29, 2022].

Covenant on Economic, Social and Cultural Rights (ICESC).[64] Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights.[65] The notion of Right to health contains four elements in its ambit- availability, attainability, acceptability, quality.

Right to health at the national level

In India, right to health is not explicitly included under any of the enumerated fundamental rights of the constitution. But this does not mean that India do not consider the value of right to health. For that very reason, right to health in India is often included under Article 21 of the Constitution of India. Article 21 of the Indian Constitution talks about Protection of persona life and liberty, which means no one shall be deprived of his life or personal liberty. The Supreme Court of India, through its progressive interpretation of the Constitution has effectively included the right to health as an integral part of the right to life (Article 21) which is a fundamental right.[66] Through a number of cases like the Bandhua Mukti Morcha v. Union of India[67], Consumer Education and Resource Centre v. Union of India[68], State of Punjab and Others v. Mohinder Singh[69], the Supreme Court of India, justifies that what all conditions and elements can be taken into consideration while determining right to health. Recognizing health care as a basic human right assumes that medical services are viewed as a natural right of all people and not a privilege of some fortunate individuals.[70]

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[64] Seema, Right to health in India: Law and Practice (2015), Department of Political science, Aligarh Muslim University, available from: http://hdl.handle.net/10603/40578 [accessed Feb 01, 2022]

[65] Committee on Economic, Social & Cultural Rights resolution 1989/11, as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments. The United Nations General Assembly in 1991 resolution 46/119

[66] Prabakar K, Right to health in India and Judicial Concern: A critical analysis (2020), Department of law, University of madras, available from: http://hdl.handle.net/10603/345096 [accessed Feb 01, 2022].

[67] AIR 1997 SC 2218.

[68] AIR 1995 SC 992.

[69] AIR 1997 SC 1225.

[70] Supra note 17.

ISSUES AND CHALLENGES OF ACCESS AND PRICING OF MEDICINES

Patent is a monopoly right which promotes the advancement of science and technology by conferring a title upon an inventor to make, use or sell the invention, only for a constrained limited period. Drugs and pharmaceutical items may be patented but the exclusivity promised by a patent may cause hardship on the part of the public due to the higher price of the branded drug. This has caused political strife across the world.[71] The patenting on medicines create monopoly in the market. A monopoly is a dominant position of an industry or a sector by one company, to the point of excluding the other viable competitors.[72] This means that if one pharmaceutical company is manufacturing, producing and selling a particular type of medicine, the exclusivity that is guaranteed to a patented product, makes it difficult for the general public to use such medicines. This is so because of the high prices fixed by such companies. Also, if taken into consideration, the concept of Compulsory Licensing, then also the medicines and the drugs that are imported in our country yields high prices because of the monopolies of the Pharmaceutical companies. This creates a challenge in the access of the medicines, when the question of right to health arises. The access to at least essential medicines shall be easy. Providing monopoly rights under patents for pharmaceuticals will block access to life-saving drugs and the patent holder can increase or decrease the price according to his own choice.[73] This monopoly results in the overpricing of the medicines. Right to health also includes access to health related information. Drug companies often abuse the patent monopoly and fix exorbitant prices for the patented medicines. The introduction of product patent thus reduces accessibility and affordability of drugs.[74] The major section of the society that is affected by such patenting on medicines are the poor people who cannot afford a proper lifestyle. The product patent provides an exclusive right to the patent owner, and this exclusivity is what leads to the non-accessibility of medicines as well as over pricing of the

[71] KOCHAVA R. GREENE, "WHAT IS DRUG PATENTING?", Available from: https://www.google.com/search?source=univ&tbm=isch&q=Kochava+R.+Greene,+%E2%80%9CWhat+is+Drug+Patenting?%E2%80%9D,available+at:http://www.ehow.com/about_5052330_drug-patenting.html&sa=X&ved=2ahUKEwi_lprOh6TpAhWQIbcAHcDPD-wQsAR6BAgCEAE&biw=1366&bih=625 [accessed Jan 28 2022]

[72] Adam Hayes, what is Monopoly (2021), available at https://www.investopedia.com/terms/m/monopoly.asp [accessed Ja 29, 2022].

[73] Gurpreet Singh, Compulsory licensing in Pharmaceutical industry- a threat or a necessity (2021), available from: https://blog.ipleaders.in/compulsory-licensing-pharmaceutical-industry-threat-necessity/ [accessed Jan 29, 2021].

[74] G. Dutfield, Intellectual property rights and the life science industries: Past, present and future, 2nd ed. (Singapore: World Scientific Publishing, 2009), pp. 315–316.

same. While the pharmaceutical industry claims that high prices are explained by the massive expenditure on R&D, the truth is that drugs they actually research have little relevance to real medical needs. Moreover, the kinds of profits that big pharmaceutical MNCs generate are an indication of profiteering and not just legitimate profit making.[75]

CONCLUSION

There is an unclear answer to the question of whether the benefits of patents on medicines have indeed exceeded costs. The patent system will benefit greatly and serve the technological and economic advantages, only after the negative impact of the patent system is properly assessed.[76] Right to health is considered to be one of the basic rights of a human being. And clearly, if they cannot access to the basic medicines, this right seems to fail in a democratic country. In order to ensure a better health care system in a country, few initiatives are required relating to the over pricing of the medicines. The World Health Organisation, which is one of the agency of United Nations that connects the world to promote health, also in its constitution have stated that right of access to health care medicines and services are basic fundamental right and it shall be made available to each and every individual, without making any discrimination on the basis of economic or social living standards of the people. So, if at all by the means of patenting on medicines, the rich get an access to the pharmaceutical drugs and the poor are denied the access on the basis of over pricing, this leads to the failure of what United Nations preaches the world. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.[77] The design of a health care system in any country must be guided by the following key human rights standards: access, availability, acceptability, quality and non-discrimination. Human rights are used proactively as a tool for provision for better healthcare. The right to health care

[75] Rahul Vicky, Right to health vis-à-vis Patent Protection: The Indian Scenario (2015), academike, available from: https://www.lawctopus.com/academike/right-health-vis-vis-patent-protection-indian-scenario/#:~:text=The%20right%20to%20life%20and,(TRIPS)%5Biii%5D [accessed Feb 01, 2022].

[76] M Rahmah, Social cost and benefit of patent protection for medicines: Case of Indonesian seaweeds hard capsule invention, Utopía y Praxis Latinoamericana, vol. 25, no. Esp.2, pp. 171-178, 2020, available from: https://doi.org/10.5281/zenodo.3809208 [accessed Jan 29, 2022].

[77] Supra note 15.

thus ensures that hospitals, clinics, medicines, and physician's services are accessible, available, acceptable and of good quality for everyone, on an equitable basis. It defined health in terms of an ultimate goal of perfection.[78] Since patents on drugs tend to push prices up, governments have a duty to ensure that the introduction of product patents does not jeopardize access to drugs. Indeed, not only should states refrain from taking any steps that limit access to drugs but also they should also actively pursue better access over time.[79]

[78] Jonathan Montgomery, Health Care Law, Oxford University Press, Oxford (1997), p.2.
[79] Supra note 26.

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PATENT AND PANDEMIC: A PANORAMIC VIEW WAIVER OF COVID- 19 VACCINES

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ABSTRACT

From the start of Coronavirus pandemic scientists in all the nations are racing against the time for a medicine or a vaccine that could potentially protect the human race from the novel virus. Some path-breaking innovations took place in the form of vaccines with great efficacy. But the vaccine has been mutating the entire world with new variants coming, thereby baffling the human race about its existence. Though innovations came there exist limitations, in the form of affordability by the poorer nations. On one side there exist the developed nations which were supported by big pharmaceuticals tussle among them to procure the best vaccines in no time to their citizens, the other side consists of underdeveloped and poorer nations grappling for the supply of vaccines at the mercy of other nations. This paper discusses several propositions to deal effectively with this issue of supplying vaccines to all the nations within a reasonable time. This discussion consists of various arguments rebutting the lobbying pharmaceuticals and some nations' notion that the patent waiver proposal by South Africa and India would not be the ideal deal for supplying vaccines all over the world. This paper goes on to mention what additional work apart from the patent waiver needs to be done for clinching this divine objective.

Keywords: *Compulsory License, TRIPS, WTO*

INTRODUCTION

The globe witnessed a disastrous impact on poor nations like India after the advent of new COVID-19 strains, which are more contagious and lethal. We saw the most heartbreaking sight of individuals suffering from a lack of oxygen, ventilators, beds, medical personnel, and other medical equipment. The collapse of the healthcare system exposed low- and middle-income nations' vulnerability to the epidemic. The current scenario has heightened the dangers of future COVID waves, and vaccination is the only option. Even though eight vaccinations have been released worldwide in less than a year since the COVID-19 pandemic breakout, India is experiencing vaccine shortages and inequitable distribution. To manage the current crisis and avoid future waves, at least five billion people must be vaccinated, with India requiring 10 billion vaccine doses. Low- and middle-income nations have insufficient access to vaccines due to a restricted capability of generating 3.5 billion doses, while rich countries have secured the majority of their production. In this regard, more than a hundred other member of WTO, USA being present in the list, collectively endorsed the request jointly presented by South Africa and India for a waiver in few portions of WTO agreement on TRIPS.

The nations South Africa and India proposed a joint request for temporarily waiving certain portions of the WTO Agreement on "Trade-Related Aspects of Intellectual Property Rights" (TRIPS). Furthermore, emphasizing the necessity for unity and solidarity in the light of health crisis that hit the globe without excluding any particular nation, the Indian Prime Minister Shri Narendra Modi Ji extended his heartful invitation to all the G-7 countries for supporting text-based discussions at their June 11-13, 2021 meeting in Cornwall, United Kingdom. Following WHO's declaration of Covid-19 as a pandemic, Joint Petition by India and South Africa before WTO is filed for waiving IP Rights for the vaccines against Corona virus.

Both the countries claimed[80] and produced proof[81] showing that these rights are to be excluded for Coronavirus vaccines as providing timely and affordable vaccines for all the people is being hindered. Under Article 25, Section 5, Part-II of the TRIPS agreement.[82] Also under Article

[80] *Waiver from Certain Provisions of The Trips Agreement for the Prevention, Containment And Treatment Of Covid-19,* WORLD TRADE ORGANIZATION, IP/C/W/669 (Jul.21, 2021, 9:15 PM), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True.

[81] Morgan Watkins, *Kentucky Gov. Andy Beshear calls on 3M to release patent for N95 respirator amid pandemic,* COURIER JOURNAL (Jul.21, 2021, 9:15 PM), https://eu.courier-journal.com/story/news/2020/04/03/beshear-calls-3-m-release-patent-n-95-respirator-amid-pandemic/5112729002/.

[82] Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, §5 (Jul.21, 2021, 9:25 PM), https://www.wto.org/english/docs_e/legal_e/trips_e.htm#part2.

39, Section 7, Part II of the TRIPS agreement, Exclusion for patent rights is called for by both the nations in order to protect human health which is jeopardized off late. Under the above mentioned provisions members can disclose the undisclosed information to protect public health.[83] Even though the majority of the countries are granting their support for Patent waivers on vaccines, many arguments advocate the anti-waiver campaign. They are as follows:-

A. Is Production Capacity on Vaccines a binding constraint on Waiver?

One of the main stigma which is revolving around the vaccine waiver concept is that the waiver can increase the production capacity of the vaccines and those who support the waiver are in a belief that there is a constraint in the production capacity of vaccines in the recent times but the conventional models of epidemiology coupled with vaccines effectiveness data, herd immunity is feasible in the world population by vaccinating nearly 45- 60% of them when the above data is viewed alongside virus reproduction rate and past infection data.[84] The overall population of 91 middle and lower-income countries is around 6.5 billion population and the preproduction capacity of 50 percent of effective vaccines (based on the threshold set by the US Federal Drug Administration on June 30, 2020[85]) in the year 2021 is around 8.05 billion (Refer the below table 1) courses which can easily outnumber the 7.05 billion population of middle and low-income countries. There is an argument that rich countries brought the vaccines more than they need[86] and even assuming this as true, after high income nations made their pre- purchase agreements, production capacity left with LMIC's is 6.05bn courses for 6.53mn people which is sufficient for immunizing nearly 93% of the eligible population in Lower and Middle-income countries, with the remaining 7% easily vaccinated with their resources.

Moreover, there is no need to vaccinate the entire population, to achieve herd immunity; only 60% of the total population is sufficient in completing their vaccine courses[87] which brings down the number to around 4 billion people. Out of the 6.5 billion people in AMC

[83] Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, §7 (Jul.21, 2021, 9:25 PM), https://www.wto.org/english/docs_e/legal_e/trips_e.htm#part2.
[84]Ruchir Agarwal & Tristan Reed, *How to End the COVID-19 Pandemic by March 2022*, WORLD BANK (Jul.21, 2021, 9:30 PM), https://documents1.worldbank.org.
[85]*Development and Licensure of Vaccines to Prevent COVID-19*,U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Jul.21, 2021, 9:30 PM), https://www.fda.gov/media/139638/download.
[86]*Rich countries hoarding Covid vaccines, says People's Vaccine Alliance*, BBC NEWS (Jul.22, 2021, 2:05 PM), https://www.bbc.com/news/health-55229894.
[87]*How Much Herd Immunity Is Enough?* , NEWYORK TIMES (Jul.22, 2021, 2:05 PM), https://www.nytimes.com.

91 countries, 3 billion people are from China, India and Russia which have their domestic vaccine facilities. Of the remaining 3.5 billion people, 1 billion people are not eligible to access subsidized vaccines, under the assumption that they can pre-purchase vaccines at market prices.[88] The 60 per cent of the remaining 2.5 billion people is 1.5 bn where under Covax facility; 1bn among them will receive their courses by the end of this year.[89]

In India as of 31st July, 10 crore people were partially vaccinated and 32 crore people were partially vaccinated.[90] India needs 60 crores more doses to achieve herd immunity and under the Covax facility, it will receive 25 crore doses by the end of this year.[91] For the remaining 35 crores, India has the capacity of producing 10-12 crore vaccines per month,[92] where it can easily achieve its target of herd immunity by end of this year. So Under these conditions, attempts to enhance capacity by relaxing patent protection will accomplish little to speed immunizations in lower-income countries. A much more viable idea is to assist lower-income nations acquire vaccines while diverting excess doses from wealthy countries to wherever they are needed most. These disputes against the waiver of IP rights due to more production capacity in the world is that there is more than enough production capacity in the world and there could be surplus vaccines which could result in its wastage. But this is not the scenario as there exist limitations with the availability of the raw materials, even the SII encountered this issue.[93] Pfizer CEO took to the press that people might require to get vaccinated against COVID-19 every 12 months.[94] The stance on this issue is also the same with Johnson & Johnson.

[88] *Supra note 5*, at1.
[89] *Costs of delivering COVID-19 vaccine in 92 AMC countries*, WORLD HEALTH ORGANIZATION 4 https://www.who.int/.
[90] MINISTRY OF HEALTH AND FAMILY WELFARE (Jul.22, 2021, 2:05 PM), https://www.mohfw.gov.in/
[91] *Supra* note 10.
[92] Shruti Menon, BBC NEWS (Jul.22, 2021, 2:05 PM), https://www.bbc.com/news/world-asia-india-55571793.
[93] Kunal Gaurav, *With folded hands Poonawala asks Biden to lift export ban from these raw materials?*, HINDUSTAN TIMES (Apr. 16, 2021), https://www.hindustantimes.com/world-news/covid19.
[94] Berkely Love Lace Jr, *Pfizer CEO says third COVID vaccine dose likely needed within 12 months*, CNBC (Apr. 15 2021), https://www.cnbc.com/.

Vaccine candidates	Company-reported production capacity in 2021(in bn)	Pre-purchases by high-income countries	Remaining production capacity in 2021
Oxford-AstraZeneca	1.70	0.49	1.21
Novavax	1.00	0.10	0.90
Sinovac	1.00	0.06	0.94
Janssen (J&J)	1.00	0.37	0.63
CanSino Biologics	0.50	0.00	0.50
Sinopharm	0.50	0.00	0.50
Bharat Biotech	0.35	0.01	0.34
Pfizer-BioNTech	1.00	0.56	0.44
Gamaleya	0.50	0.03	0.47
	0.50	0.35	0.15
TOTAL	6.05	2.00	8.05
Vaccine candidates	**Company-reported production capacity in 2021**(in bn)	**Pre-purchases by high-income countries**	**Remaining production capacity in 2021**
Oxford-AstraZeneca	1.70	0.49	1.21
Novavax	1.00	0.10	0.90
Sinovac	1.00	0.06	0.94
Janssen (J&J)	1.00	0.37	0.63
CanSino Biologics	0.50	0.00	0.50
Sinopharm	0.50	0.00	0.50
Bharat Biotech	0.35	0.01	0.34
Pfizer-BioNTech	1.00	0.56	0.44
Gamaleya	0.50	0.03	0.47
	0.50	0.35	0.15

TOTAL	6.05	2.00	8.05

Table-1

These disputes against the waiver of IP rights due to more production capacity in the world is that there is more than enough production capacity in the world and there could be surplus vaccines which could result in its wastage. But this is not the scenario as there exist limitations with the availability of the raw materials; even the SII encountered this issue.[95]Pfizer's CEO took to the press that people might require to get vaccinated against COVID-19 every 12 months.[96] The stance on this issue is also the same with Johnson & Johnson. So even if the IP rights are waived due to the unavailability of raw materials in the international market all the manufacturers will be unable to produce them. The estimates in a paper published by Gita Gopinath in IMF say that 350 billion vaccines are enough to get herd immunity in the 91 nations that are the beneficiaries of Covax barring India, China and Russia.[97] When we look into the concept of herd immunity it is unclear to Covid how much population needs to be vaccinated for herd immunity and overseeing the fact that people can be infected even after being vaccinated.[98] New variants are coming up in several countries and are spreading faster but the million-dollar question remains unanswered i.e., whether the existing vaccines can protect from these variants it is not just the efficacy, can they protect from these variants of concern either from getting infected or from death.[99] This paper that discussed herd immunity did not understand it properly as herd immunity if at all is aimed at vaccinating sixty per cent of the total population the current vaccines aim at people above the age of eighteen; So the child population is still susceptible to the virus. One of the most significant roadblocks raised by the ones against waiver of patent rights for vaccines against the deadly novel corona virus is that simple waiver of patent recipe for copying the vaccines and this necessitates the transfer of technology and know-how for many new manufacturers of vaccines particularly of mRNA type vaccines.

[95] Kunal Gaurav, *With folded hands Poonawala asks Biden to lift export ban from these raw materials?*,HINDUSTANTIMES (Apr. 16 2021), https://www.hindustantimes.com/world-news/covid19.
[96] Berkely Love Lace Jr, *Pfizer CEO says third COVID vaccine dose likely needed within 12 months,* CNBC (Apr. 15 2021), https://www.cnbc.com/.
[97]RuchirAgarwalo, *A proposal to end the COVID- 19 pandemic*, IMF (2021).
[98]*COVID- 19 Herd immunity, lockdowns and COVID- 19,* WHO (DEC. 31 2020), https://www.who.int.
[99] Even Callaway & Heidi Ledford, *How to redesign COVID vaccines so they protect against variants,* 590 NATURE 15, 16 (2021), https://doi.org/10.1038/d41586-021-00241-6.

Few opponents of waiver have a believe that, if governments are unable to promise protection up-to some extent to the originators trade secrets in the coming future, there exists no possibility of revealing them at present which would make the inventors of vaccines very less inclination for voluntary participation in effective vaccines supply.

B. Granting Compulsory Licenses- An effective method in place to reduce the vaccine shortage?

Compulsory licensing is generally allowed as the same was imbibed and is a part of TRIPS Agreement's general balance between promoting access to current technology and supporting research and development into newer and finer technologies. The provision is Article 31 which provides for compulsory licensing and use of this patented inventions by government without any sanction to use from the inventor, but these restrictions are designed alongside for preserving legitimate patent holder's interests

In theory, patent owners are entitled to monetary compensation. All members have the option of granting a compulsory licence under Article 31 to produce or import. While compulsory licencing has received a lot of attention in the pharmaceutical industry, this provision is not restricted to only pharmaceutical sector and applies to each and every sector.

All members of TRIPS are given with the authority for giving such compulsory licenses for any product not limiting to diagnostics, vaccines, medicines as well as any other equipment which is effective and necessary against coronavirus battle.[100] Some members have simplified processes for granting compulsory or government usage licences in preparation for a pandemic. A government use licence for a possible treatment has been issued by one of the members. Another option is voluntary licencing, in which the holder of patent is involved in granting a permission to third party for producing and selling the patented goods on mutually agreed terms. Voluntary licences (VLs) are a method that allows patent holders to enable others to use their patents willingly. Make many breakthroughs in biotechnology were made through effective use of Voluntary Licensing, in the fields of biotechnology, genetics and, most recently, repurposed goods which are patented for COVID19. AbbVie, for example, voluntarily waived any MPP licensee requirements that would hinder generic firms from

[100] Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Article 31 (Jul.21, 2021, 9:25 PM), https://www.wto.org/english/docs_e/legal_e/trips_e.htm#part2.

providing lopinavir/ritonavir (Kaletra®), including limitations on the supply of generic HIV medicines.[101] The parliament has demanded that the government issue compulsory licences which can assure access to diagnostics, vaccines and medicines relating to Coronavirus. Compulsory licencing may be a helpful policy instrument for increasing access to COVID-19 medicines or vaccinations in the future, especially in instances when the access to affordable health technology in good and sufficient numbers may not be assured otherwise to every member.[102] For example, Bill C-13 (which is a legislation into address all the measures relating to curtailing coronavirus) obtained Royal Assent in Canada.

Upon the Minister of Health's request, Bill C-13 modifies Patent Act in Canada which will allow the Commissioner of Patents in Canada for approving the Canadian government or any other person designated for furnishing the patented innovation the amount required for reacting to the emergency health situation in the nation that is created. These changes include safeguarding the interests of patent holders which include, ensuring that a holder a product that is patented is receiving remuneration that is adequate for utilizing the patented product and limiting the timeline for which authorization to use the product is granted, notifying the holder of patent of this authorization along with ensuring that holder of this patented product has recourse to judiciary when any acts outside the preview of authorization are committed by any person.[103]

An amendment in Germany to the "Prevention and Control of Infectious Diseases in Humans" gives the power to parliament the required authority for assessing whether or not a certain epidemic situation which is having national significance. By the reasoning of national security or public interest Federal Health Ministry is vested with the powers to direct the concerned officials for allowing the usage of inventions that are protected by patents for ensuring effective supply of all the technologies relating to health such as diagnostics, medicines and others of the likely nature.[104]

[101]Edsilvernews, *Gilead signals steps to widen global access to remdesivir for Covid-19 patients* (Jul.22, 2021, 2:05 PM), https://www.statnews.com/pharmalot/2020/05/05/.
[102]*The Trips Agreement and Covid-19*, WORLD TRADE ORGANIZATION. 9 (Jul.22, 2021, 2:05 PM) https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf.
[103]*Bill C 13*, PARLIAMENT OF CANADA (Jul.23, 2021, 2:05 PM), https://www.parl.ca/DocumentViewer/en/43-1/bill/C-13/royal-assent.
[104] BGBL (Jul.22, 2021, 2:05 PM), https://www.bgbl.de.

The Government Decree 212/2020 (16 May) on public health compulsory licences for exploitation within Hungary establishes a public health obligatory licence that is enacted for exploiting within Hungary, is based on Article 31 of the TRIPS Agreement.

Government Decree 212/2020 passed in 16/May passed in Hungary on compulsory licenses for safe guarding public health for exploitation of these patented products within the nation, is based on Article 31 of TRIPS and on 18th June 2020 this state of danger declined and the decree 212/2020 is not in force anymore.[105]

Israel's Health minister on 18th March 2020 approved a resolution which enabled government of Israel for importing from India generic versions of lopinavir/ritonavir. This is made in order to examine the likelihood of treating with this medicine, the patients affected with Corona virus. TRIPS Agreement did not clearly establish the terms basing on which a justification may be reached for issuing compulsory licensing, this leaves the signatories a leeway in establishing the grounds to issue compulsory licenses. Various statutes recognised the common ground of National Emergency for Compulsory licensing. A cue from New Zealand's patent law may be taken to see that it permits the government to use this compulsory license in cases of national emergency, the same was declared in New Zealand on 25th March 2020.[106]

Now let us examine the information disclosed when an application for the patent is present. In India - Section 10(4)(b) of the law on patents[107] says that every applicant must disclose the "best method for performing the invention". The United States Legislation also prescribes the same method as in India.[108] Europe patent convention's Article 83 mandates a different disclosure departing from the Indian law by mandating that the disclosure must be clear and complete to the sufficient extent for carrying out the invention. But this information is not sufficient for the invention to be carried out with the efficiency if it was prepared by the

[105] NJT (Jul.23, 2021, 2:05 PM), https://njt.hu/translated/doc/J2020R0212K_20200517_FIN.pdf.
[106] *The Trips Agreement and Covid-19*, WORLD TRADE ORGANIZATION. 9 (Jul.24, 2021, 2:05 PM). https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf.
[107] The Indian Patents Act, 1970, § 10(4)(b).

[108] § 112 US Patents Act.

inventor. This was discussed by Cristofer Garrison[109]. Trips Agreement Article 29(1) says that Art. 29.1 TRIPS provides that *"Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application."*

In most of the scenarios, information disclosed by the publication relating to patents is only a sufficient information on carrying out the invention by other manufacturers. While in some other circumstances, the best practice which is known for the patent holder and is disclosed, will not be sufficient for allowing any effective and making the product commercially viable for successfully carrying out this invention. This is especially true for some of the Covid-19-related products that are more technologically advanced, such as "monoclonal antibody (mAb) therapies and mRNA-based vaccines." Additional know-how will almost certainly be required to enable commercially viable production at a large scale. There exists a complex web of IPs protecting the m- RNA based vaccines.[110] If the example of Moderna's m- RNA based COVID- 19 vaccine is taken it involves a total of 7 patents including the raw materials, and other components to manufacture the vaccine. Similar to these all the m- RNA based vaccines have a complex system of patents protecting them.[111]

When a patent application is submitted however, it will also be essential to depend on test data to secure regulatory clearance for the final product, which may not be disclosed and would be forbidden when a Article 39.3 of TRIPS is implemented when the clause relating to data exclusivity is implemented. The 'intellectual property stack' consists of three rights viz know how-, data exclusivity and patents in those members where they exist. Access to all these 3 pieces of the stack simultaneously is mandatory to produce and deliver the product. Compulsory license under Section 84 of Indian Patent regime, deals with the rules comprising

[109]Cristofer Garrison, *What is the 'know-how gap' problem and how might it impact scaling up production of Covid-19 related diagnostics, therapies and vaccines?,* MED. LAW AND POLICY, (Dec. 16, 2020), https://medicineslawandpolicy.org/.

[110]*The Patent Landscape Behind COVID- 19 Vaccines*, 12(3) INT. PHARMACEUTICAL INDUSTRY 20,20 (2020), https://www.ipimediaworld.com.

[111] Mario Gavria, *A Network Analysis of COVID- 19 m-RNA based vaccines*, NATURE BIOTECHNOLOGY (May. 12, 2021), https://www.nature.com.

issuance of Compulsory Licenses in India. Subsection (1)[112] says that the applicant must apply only after 3 years after the granting patent. The Indian Law needs to be amended if the only indigenous vaccine Covaxin is to be given a compulsory license. When we look into the TRIPS agreement Article 5(4)[113] also mandates that three years need to be completed after the granting patent so that an application fora compulsory license will be considered. The law on Compulsory licenses is not devised to deal with when there is any pandemic.

Even though the compulsory license is granted there exists a limitation to the information which is received by the applicant. This data is known as "know-how" data and other trade secrets. These data and secrets include specifications, process controls and monitoring, quality control processes, technical training, working methods, and other aspects that, although not particularly "groundbreaking" on their own, may be difficult for a third party to grasp when combined. The classic example of Brazil which tried to replicate the products of the Portuguese to manufacture them without a license resulted in utter failure.[114] It is vital at this point to know about Article 39.2 of the TRIPS agreement.[115]The MSF Access Campaign also published Compulsory licencing is burdensome and time-consuming, according to a new report, because this compulsory licensing is to be applied only on country to country and product to product basis, and there are frequently significant regulatory hurdles to overcome. The Doha Declaration only deals with one type of intellectual property: patents. The TRIPS waiver proposal, on the other hand, would cover not necessarily patents but other forms of IP rights are also covered.[116]

"*Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (footnote) so long as such information"*

[112]The Indian Patents Act, 1970, § 84(1).

[113]TRIPS Agreement, Art. 5(4).

[114]*Supra,* note 3.

[115]TRIPS Agreement, Art. 39.2.

[116]*Analysis of EU positionon Compulsory Licensing and TRIPS waiver in the COVID- 19 pandemic*, ACCESS CAMPAIGN (May. 27, 2021), https://msfaccess.org/.

(c) *"Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*"

Article 39.2 gives power to the patent holder to keep the information that is meant to be secret and under Article 39.3 protection is afforded to undisclosed data or any other data which involves considerable effort from unfair trade practices. This rule applies to products involving chemical products in agriculture or pharma industries that will utilize new chemical particles.

Now, when the recent examples of

1. Gilead recently filed a lawsuit against the government of Russian against the issuing compulsory license for production of Remdesivir which is one of the main drug that is utilized for treatment of Coronavirus. But The Supreme Court did not satisfy Gilead Sciences' claim against the government for issuing a compulsory license for Remdesivir.[117]
2. In 2020 Hungary made amendments through the decree dated 212/2020 which allows for implementing compulsory license in the reason of public health but other organisations such as Pharmaceutical Research and Manufacturers of America (PhRMA), the Biotechnology Innovation Organization (BIO) and US chamber of Commerce flagged the Hungary's compulsory license as un-warranting and not necessary.

These examples clearly state that pharma companies are not in favour of compulsory licenses, even if any compulsory license will be issued without the complete knowledge of trade secrets it is highly difficult to replicate the product completely.

C. Voluntary Licensing - Can it solve the complexities of Compulsory License

Voluntary licencing is a practice in which the vaccine or drug's developer decides who and under what conditions the IP can be licenced to enable manufacturing. The classic example of this is the license given by Astragenca to the Serum Institute of India for manufacturing

[117] Margarita Grosheva, *SC Rejects Gilead's Claim to Revoke Compulsory Remdesevir License,* PHARMVESTNIK (May. 27, 2021), https://pharmvestnik.ru/content.

vaccines. Gavi, the Vaccines Alliance, a non-profit backed by wealthy countries and the Gates Foundation, would develop vaccines for all poor countries eligible for aid. Nearly half of the world's population which is nearly 4bn people, lived in these 92 countries. India should have received 35% of these vaccines based on its population. However, there was an unspoken agreement that Serum would set aside 50% of its supply for domestic use and 50% for export.[118]

The deal which become made with the aid of using Astrazenca with SII for voluntary licensing did now no longer encompass regulations on what charge Serum should charge, regardless of AstraZeneca's pledge to promote its vaccine for no profit "in the course of the pandemic", which bought by Uganda, which is the poorest nations on Earth, paying extra than Europe for the identical vaccine. Uganda is expected to pay USD 7, although the firm (SII) claims it might be reduced to USD 4, which is still higher than what Brazil and other EU countries are paying. Another manufacturer, Fiocruz, is paying $3.16 per dosage in Brazil. Pillay (South African Deputy Director-General) explained that wealthy nations pay less because they spend on vaccine research and development. Contributions that flowed very early in developing the Oxford/Astrazenca vaccine is reflecting the rationale in part although it does not entirely explain the discrepancies. SII receives USD 5.25 per dosage from South Africa.[119]This means that the majority of vaccinations sent to underdeveloped nations are produced by only one company, SII. There is an open Covid commitment to make the intellectual property available for free to help end the COVID-19 pandemic and reduce the disease's effect by making it available under a licence that outlines the terms and conditions under which our intellectual property is made available.[120]This pledge is dominated by the technology companies and not the vaccine producers.[121]

WHO created a COVID-19 technology access pool to enable the companies to voluntarily share the data regarding the manufacturing process the United States and The European

[118]Carmen Paun&Ashleigh furlong, *Poorer countries hit with higher price tag for Oxford/AstraZeneca vaccine,* Politico (Feb. 22, 2021), https://www.politico.eu.

[119]*Seven reasons the EU is wrong to oppose the TRIPS waiver*, HUMAN RIGHTS WATCH (Jun. 03,2021) https://www.hrw.org

[120] https://opencovidpledge.org/.

[121] *supra*, note 13.

Nations which produce the m- RNA based vaccines did not endorse this move of WHO.[122] This list does not comprise India where SII is located and 1 indigenous vaccine is available. Also WHO in efforts to make vaccines available to all established a COVID- 19 mRNA technology transfer hub to scale up global manufacturing, but no company turned favour to this.[123]A Canadian Company named Biolyse Pharma made unsuccessful attempts to secure licenses for manufacturing COVID- 19 vaccines. It approached AstraZeneca and Johnson & Johnson for the license to manufacture the vaccine for poorer countries. AstraZeneca denied, and J & J denied to reply.[124] Alongside this company, many manufacturers are ready and willing to manufacture the vaccines subject to the license.[125]The recent study[126] result shows The R&D of ChAdOx and the Oxford-AstraZeneca vaccine received 97.1-99.0 per cent of the financing from the government. Furthermore, this investigation discovered a significant lack of openness in research funding reporting procedures. For the development of their Covid-19 vaccine, Johnson & Johnson got an estimated US$1 billion (€820 million) in financing from the US government; Moderna's vaccine was also heavily subsidised by the US government. Experts point out that the main reason for de-risking the pharmaceutical companies is the advanced market commitments. These commitments gave a market assurance much before the vaccines were proven to be safe and effective, in circumstances where taxpayer money was not directly involved in the vaccine development, these advanced commitments de-risked the pharma companies' risk. Since the vaccine companies were funded from the public money by the respective national governments their priority commitments would be the vaccination of their people and not the poorer nations which could afford the vaccines.

Lifting Export Restrictions: Could this solve the Paradox?

Rich nations like the United Kingdom and Canada, on the other hand, had no moral right to tap

[122]*The following member states have informed WHO and /or Govt of Costa Rica that they are joining the solidarity call to action*, WHO, /https://www.who.int.

[123] WHO, https://www.who.int/

[124] Ed Silverman, *Canadian Company pursues compulsory license to distribute COVID- 19 vaccine to low income countries,* PHARMALOT(Mar. 29, 2021), https://www.statnews.com/pharmalot/.

[125]*Seven reasons the EU is wrong to oppose the TRIPS waiver*, HUMAN RIGHTS WATCH (Jun. 03,2021) https://www.hrw.org.

[126]*supra*, note 13.

into a pool of vaccines allocated for impoverished countries since they had purchased more doses than were necessary to vaccinate their citizens, to the disadvantage of everyone else. Surprisingly, when South Africa and India requested that the World Trade Organization temporarily remove patents and other pharmaceutical monopolies so that vaccines may be made more broadly to avoid supply shortages, the United Kingdom, Canada, and Brazil were among the first to protest.

From the beginning of the Coronavirus Pandemic, the United States introduced some new export restrictions[127]on the necessary raw ingredients for the production of vaccines and the European Commission[128] and India[129] also imposed restrictions on the export of Covid-19 vaccinations. For the Covid-19 response, European leaders have highlighted export and trade restrictions as the main obstacle hampering the access to medicines and one component of the EU's next strategy will focus on trade and export restrictions.

To guarantee that all EU people have timely access to COVID-19 vaccinations and to address the existing lack of transparency surrounding vaccine exports outside the EU, the Commission has now implemented a rule mandating that such exports be subject to Member State permission. This is the stance taken by European Union. India in an effort for battling the covid-19. It was now holding its stance back on nearly 2.4 million doses. India is now desperate completely for all the doses of the AstraZeneca vaccine, SII is making available. The stance changed from exporting vaccines to nearly 60 countries from SII to very less exports. It is not that there is an embargo on the exports of vaccines but on the products which are used to manufacture them. This is the concern with SII which prompted him to write to the Joe Biden's Administration to lift the embargo on the exports of these materials. Biden administration announced that it would use a 1950's Defence Production Act, to boost vaccine production. This raised alarm in Adar Poonawala. Not only him, but Ireland's PM was also concerned that Embargo on vaccines and their raw materials would harm vaccine production. As the

[127]*American export controls threaten to hinder global vaccine production*, THE ECONOMIST (Apr. 24, 2021), https://www.economist.com.

[128]EUROPEAN COMMISSION (Jan. 29, 2021), https://ec.europa.eu.

[129] Samuel Cross et al., *Who funded the Oxford Astrazeneca Vaccine Approximating the funding to the University of Oxford,* MEDRXIV (Apr. 10,2021), https://doi.org/10.1101/2021.04.08.21255103.

production of vaccines needs to be approved by the regulators of the countries, finding the substitutes quickly in the shorter term is quite impossible.

Though restrictions on exports did hamper the global access to pharmaceuticals, initiatives for alleviating them are not addressing the most important need for diversifying and expanding the vaccine production by sharing the intellectual property, through open and non-exclusive licensing, if we had a bigger and more diverse global manufacturing capability, any particular region's export prohibitions would be considerably less consequential or possibly destructive. This means that more manufacturers need to manufacture the COVID- 19 vaccines.

D. Incentives & Quality Constrains

To incentivize private investment in pharmaceutical R&D, several kinds of intellectual property rights (IPRs) are used. Patents are very important for encouraging R&D. They also encourage the spread of new information since they need disclosure.[130]Adapting vaccinations against changing Covid-19 viruses might cost a lot of money in the future. However, whether vaccine developers will be ready to do so if they are no longer able to amortise their past investments based on their patents is debatable. Furthermore, existing Covid-19 vaccines are mostly covered by basic patents that also apply to other medical disciplines, such as cancer therapy. Such basic patents would have to be waived to be able to make vaccinations. Such basic patents would have to be waived to be able to make vaccinations. This might have ramifications beyond vaccinations, as it is likely to impact investment incentives for future research and development in such fields.[131]

The US-supported for Vaccine patent waiver after considerable consideration, but pharmaceutical corporations have termed the US move to endorse the sharing of secret ingredients for vaccines foolish, stating that comprehending the manufacturing process is the true difficulty. It's like throwing out a recipe without providing the process or the ingredients, they warn, and it might lead to quality difficulties and inefficient manufacturing. Nathalie Moll, director-general of the European Federation of

[130]*Treatments and a vaccine for COVID-19: The need for coordinating policies on R&D, manufacturing and access*, OECD, 11 (Jul.24, 2021, 2:05 PM), https://www.oecd.org.
[131]RetoHilty, *Arguments against a Waiver of Intellectual Property Rights,* OXFORDLAW(Jul.24, 2021, 2:05 PM),
https://www.law.ox.ac.uk.

Pharmaceutical Industries and Associations, believed that more capacity was necessary and suggested that *"skills and technical know-how of the vaccine developer to bring onboard partner manufacturing organizations. You simply cannot achieve this kind of capacity expansion by waiving patents and hoping that hitherto unknown factories around the world will turn their hand to the complex process of vaccine manufacture," she said. "A waiver risks diverting raw materials and supplies away from well established, effective supply chains to less efficient manufacturing sites where productivity and quality may be an issue. It opens the door to counterfeit vaccines entering the supply chain around the world.*[132]"

Even if the waiver is granted, there would be many more problems to come and one among them is the quality of the vaccine. When a waiver is granted, there would be 'n' no of pharmaceuticals working on it which may lead to compromise on quality. The problem which is subsisting is not relating to the patens, the problem is something which is having the enough capacity for creating vaccines with peak standards. This problem is aggravated especially in poor countries that could not afford huge investments in good expertise for creating a high quality vaccine. But the argument that the safety of the vaccines gets compromised is not tenable as there are drug regulators and WHO which are meant for doing this job.[133] If in place, the TRIPs waiver allows the transfer of technological know-how, quick scaling-up of vaccine and medical product manufacture, and simple access to vaccinations in the battle against the COVID-19 pandemic.[134]

E. Waiving Intellectual Property Rights in the TRIPs: Will this be the Solution?

In the above sections, this paper discussed Production Capacity, Compulsory License, Voluntary License, and Lifting Export restrictions, from the above discussion it's easy to say that they individually cannot do the arduous task of providing vaccines to all the nations in the world. Now, this section will discuss how Waving the Intellectual Property Rights could solve this problem.

First, it is useful to know in abstract why all the above three will not

1. Compulsory Licensing mechanism is not devised to deal with pandemics like COVID-

[132] Gareth Iacobucci, BRITISH MEDICAL ASSOCIATION, https://www.bmj.com.
[133] *Regulation of vaccines: building on existing drug regulatory authorities*, WORLD HEALTH ORGANISATION 1, 5 (2020), www.who.int.
[134] *WTO TRIPs | Waiver on COVID-19 vaccines Promoting One World, One Health*, CUTS INTERNATIONAL 1, 1 (2021), https://cuts-citee.org/pdf.

19 and each country needs to amend their legislations accordingly we have seen the examples of pharmaceutical companies suing nations like Hungary, and Russia for issuing compulsory licenses.

2. Voluntary licensing- This must be done by the companies voluntarily which were holding the rights and many efforts by WHO went in vain for voluntary licensing, we also had seen the limitations of SII for delivering Oxford- Astrageneca vaccines to the World.
3. Lifting Export Restrictions- Though this will increase the supply of ingredients necessary for vaccine manufacturing, this cannot diversify the manufacturing of vaccines across the globe.

Submissions of South Africa and India to WTO[135]

Giving the current situation of emergency around the globe, collaboration must be done by WTO for ensuring all the IP rights and trade secrets are not hampering the path to timely access for inexpensive medicines where vaccination is an example and medications which are inevitable ones, along with this it must also be ensured that public health measures are scaled up

Other intellectual property rights, in addition to patents, may act as a barrier, with limited options for circumvention. Furthermore, many countries, especially developing countries, may face institutional and legal problems in implementing the flexibilities of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The constraints of Article 31bis, and hence the onerous and long procedure for the import and export of pharmaceutical items, are especially concerning for countries with minimal or no manufacturing capabilities.[136]

Now here comes the examination of Waiving the Intellectual Property Rights

Vaccine exports from a single firm in India presently provide one-third of the globe. However, to fulfil the huge local demand, India restricted vaccine exports, leaving nations in Sub-Saharan Africa scrambling for vaccines and their populations more exposed to viral

[135]*Waiver from certain Provisions of The TRIPS agreement for the Prevention, Contamination and Treatment of COVID- 19*, WORLD TRADE ORGANIZATION (Oct. 2, 2020)
[136]Morgan Watkins, *Kentucky Gov. Andy Beshear calls on 3M to release patent for N95 respirator amid pandemic*,C. JOURNAL (Apr. 3, 2020), https://www.courier-journal.com/.

resurgences. Co-chair of the African Vaccine Delivery Alliance, AyoadeAlakija,[137] told the *Financial Times*, "We're at the point where we're rearranging deck chairs on the Titanic."[138]Coming to the United States Because American taxpayers sponsored their creation, the Biden administration has the authority to compel Johnson & Johnson and Moderna, in particular, to disclose the technology underlying their vaccines. The US government contributed approximately $1 billion to J&J's research, paying a large percentage of the costs. Moderna admitted that a $1 billion government funding paid 100 per cent of their research expenditures. Lifting the patents can be done by President Biden itself deriving powers from The Defense Production act.[139]But the administration is not acting towards this. For instance, Moderna has a total of 7 patents on its vaccine and if all the patents get waived vaccine gets available in the global market and all the nations will get the opportunity to get vaccinated.[140]

The recent version of plan that is put forth by India, African Group and several other nations, which sets out a broad based waiver of all the regulations impeding the equitable distribution to deregulate the IP rights mentioned in Sections 1,4,5, & 7 of Part II in TRIPS agreement as well as enforcement provisions stipulated in Part III of the agreement. The regulating provisions set out above in Part II includes protection of Trade secrets, industrial designs, patents and Copyrights. The move to have such a waiver is to make nations to temporarily bypass the laws that protect the vaccine's knowledge and innovation. If the restrictions in IP are waived in the national level local manufacturers can start manufacturing and selling these innovations which are patent protected without obtaining any particular license with the initial business persons and without any fear of international and legal complications.

The waiver of IP rights would also cover "health goods and technologies for the prevention, treatment or containment of COVID-19." This waiver also covers gadgets for medicinal purposes, personal protection equipment (PPE Kits), medical diagnostics, , therapeutic

[137]Chelsa Clinton, *Biden has the power to vaccinate the world,* THE ATLANTIC (May. 5, 2021),https://www.theatlantic.com/ideas.
[138]David Pilling, *There are no vaccines; Covid fears raise in Africa as inoculations stall,* FINANCIAL TIMES (May. 4,2021), https://www.ft.com/.
[139]*Joe Biden to Direct agencies to use Defence Production Act, to fight Against COVID- 19*, BUSINESS STANDARD (Jan. 21,2021), https://www.business-standard.com.
[140] https://www.modernatx.com/patents.

medications and vaccines along with the other equipment and goods necessary for manufacturing the afore listed items. Waiver which is proposed must not be taken back for 3 years from the date of granting and it needs to be alive in that period, annual reviews and evaluations being done by the General Council of WTO along with the comprehensive review at the end of the third year to assess whether the exceptional circumstances existed one the end date, and a future decision on further extension yields better results.

There is very much known about the intention of US on the language used for expressing its interest in waiving the rights, the announcements to public on the waiver are curtailed only to vaccinations and not 'to vaccines', which is making this approach of US a step lesser to a complete genuine argument on TRIPS waiver and it seems to be more like a waiver of patents to vaccines. It is already known that in general this proposed waiver of patent rights in the TRIPS is not much adequate for stalling this pandemic in one go. Surrendering this patent rights in no way provide money for all the nations for establishing manufacturing units in a blink of eye and this not necessarily transfers the trade secrets for vaccines automatically, and re- routing supply chains in overnight will also be a dauntable task.

CONCLUSION

In this paper, we have discussed in brief various aspects both supporting and opposing the moves which would help the world in vaccinating all the individuals. The main aspect is the waiver of Intellectual property rights from the TRIP's agreement. We had seen several arguments surrounding this waiver when this was first proposed by South Africa and India in World Trade Organization. It was a welcome move from some big countries that are in favour of it. We hope this waiver comes into reality though it was an arduous task to convince the countries. On the other side, the EU is the one which is vehemently opposing this Intellectual Property Rights Waiver and is suggesting another route to solve the issue of vaccinating for all the people in the world. This paper also discussed various possibilities apart from the waiver, it can be said from this discussion that any other move apart from the waiver will be unable to give desired results not even in the shorter run. The benefits of these moves cannot outweigh the benefits that could arise if there is a waiver of patent rights. Compulsory licensing is to be done at the individual country level by amending their existing legislations even then it could

not guarantee the solution without further legal issues and also we have analyzed various aspects of pre-production and production capacity of different vaccine manufacturers where they have enough capacity to produce but they do not have raw materials which shows the dire need of patent waiver. The problems with incentives and quality constraints can easily be tackled at the international level through proper monitoring of these bodies. Voluntary licensing must also be done by the companies itself who invented the vaccines, talks at the political level must also happen for bearing the fruits, unfortunately, all the efforts of WHO and other manufacturers to diversify the manufacturing went in vain, we also saw how lifting the export restrictions helps only existing manufacturers and all these arguments and counter-arguments depicts the only solution is a waiver of patent on Covid-19 vaccines.

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REQUIREMENT OF COMPULSORY LICENSING IN THE PHARMACEUTICAL DOMAIN

Padmalaya Kanungo

INTRODUCTION

Compulsory Licenses usually refer to the mandatory agreements between the sellers who are not willing to sell and purchasers who are interested in buying, and the states impose these agreements. A necessary permit is a legitimate instrument mainly for constraining the protected innovation proprietors to permit their legally allowed right to the intrigued outsiders fit for assembling the licensed item at less expensive costs. Anti-trust infringement has likewise been denounced through granting mandatory licenses in certain locales where maltreatment of Intellectual Property Rights prevailed, prompting the prohibition of rivals in the industry. A few peaceful treaties like "WIPO, Paris Convention for the insurance of mechanical property and WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) have ordered for necessary licensing."[141] "Several contracting states have been given few factors by these treaties such as advancement of general wellbeing and sustenance, advancement of the public areas of essential significance to their financial and innovative importance."[142]

Many nations have adopted compulsory licensing to prevent the severe abuse of IP rights by organizations. Compulsory Licensing request was passed newly in our country as the impact

[141] Article 5(a) of the Competition Act, 2002.
[142] Articles- 8, 31, & 40 of TRIPS Agreement.

of mandatory authorizing of IP rights presently can't seem to be felt for all intents and purposes in our country. While managing necessary authorizing and its different aspects, this venture will impact to anticipate the impact on competition of our country by compulsory licensing. Along with this, our research project would be concentrating on the achievability of necessary licenses request by the Competition Commission of India under the Competition Act 2002. This research paper would also focus on what adds up to be maltreatment of IP Rights with connection to Law of competition.

Literature Review

One of the most significant tasks involved in writing a well-researched paper is reviewing existing literature on the topic chosen by the author. It is essential to refer to and carefully read the previous materials to gain an idea of the topic of research. The first and foremost step to begin a research paper is to overview the previous literature. It helps the researcher get a clearer view of the research topic and provides the researcher with a better understanding of the different facets of the topic. The authors have exposed themselves to various materials available on the given research topic to complete this research paper. This paper mainly draws a nexus between compulsory licensing and competition law. The authors have referred to ***"Compulsory Licensing of Patented Inventions"*** by **"The Congressional Research Service"** (CRS) is an internet article that we have used for our research. It has been beneficial as we could understand the impact of licensing in various countries around the world. The article has been quite informative, but it has failed to mention the connection or link between competition law and compulsory licensing which, is the core element of this research work. The presentation of the article was also very vague. The second work that was referred to is ***"Intellectual Property Rights and the use of compulsory licenses options: For developing countries," by Carlos M. Correa***. It is a research article that mainly focuses on the concept of compulsory licensing and its grounds. It has mentioned various case laws by explaining every concept clearly. Nevertheless, it has concentrated on compulsory licensing on anti-trust legislation in the US and not of other countries. There is also a lack of proper analysis on unfair competition and IPR. The next literature referred for the research work is **"The Curious Case of Compulsory Licensing in India,"** by **Naval Chopra and Dinoo Muthappa**. The authors have broadly covered the topic of compulsory licensing concerning IPRs and competition law. The article has given a detailed description of Nacto vs. Bayer case, India's first compulsory licensing case and has also discussed the approaches of various

countries on compulsory licensing. As the article's title suggests, it would deal with the development of compulsory licensing mainly in India, but it has failed to concentrate on the Indian scenario adequately.

Research Objective

The primary goal of the present research is to examine the impact of licenses on the competition by emphasizing the Indian legislative environment for intellectual property rights and competition law. This project also aims to assess the viability of the "Competition Act 2002's Compulsory Licensing Order". This research paper aims to look at incidents of compulsory licensing and their impact on competition in different jurisdictions. It also discusses the efficacy of compulsory licensing to check anti-competitive practices in the market and how it can be a legitimate solution to maintain healthy competition in the market.

Research Methodology

The methodology or approach adopted for the Research Project is essentially a Doctrinal Research Methodology. Books, notes, articles, online papers, journals, and various other sources and internet content are all considered relevant. Various talks were informative, edifying, and supporting, providing us with the advantage and authentic course to continue with the study we have thoroughly investigated. This research study is completely doctrinal and based on theory, focusing on case law, legal principles, and legal provisions. This research work involves primary and secondary data sources as a reference has been taken from different legislations, relevant case laws, international conventions, etc. Secondary sources such as articles, blogs, journals, etc., have been used to get a better insight into the topic. Online databases such as Manupatra, SCC, and Jstor are also used as references.

Research Questions

1. Does Compulsory license incite Competition?
2. Whether the Indian Competition Act allows the usage of compulsory licensing to prevent monopolistic practices by IP holders?
3. How does compulsory licensing affect competition in the market?

A BRIEF INSIGHT INTO THE CONCEPT OF COMPULSORY LICENSING IN INDIA

Compulsory licensing can be defined as an authorisation or license granted by the government to interested buyers for using, manufacturing, or vending a patented product or a process without the patent holder's permission. The Patent Authority issues the approval following the provisions of the Indian Patents Act,1970. There are several agreements concerning compulsory licensing worldwide. The emergence of compulsory licensing at a global level date back to the Paris Convention,1967. The idea of compulsory licensing is first acknowledged in Article 5(A) of the Paris Convention, which states that "A compulsory license may not be applied for, on the ground of failure to work or insufficient working, before the expiration of the period of four years from the date of filing of the patent application or three years from the date of the grant of patent, whichever period expire last; it shall be reduced if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferrable, even in the form of the grant of a sub-license, except with the part of the enterprise or goodwill which exploits such license."[143]

Even the TRIPS (Agreement on Trade-Related aspects of Intellectual Property Rights) recognise the concept of compulsory licensing and discusses different aspects related to compulsory licensing. Article 31, "Other use without the authorization of Right Holder," talks about compulsory licensing. Specifically, article 31 (c) states, "the scope and duration of such use shall be limited to the purpose of which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive."[144] There is a difference in perception regarding compulsory licensing among the nations that are part of TRIP. The developed countries view this provision of compulsory licensing with doubt, whereas the developing nations recognise it as a matter of significance.

In 2012, India made the first of its kind move by granting its first compulsory license to a pharmaceutical product. This move gave rise to many discussions as to the stand taken by India in the global platform. Chapter XVI of the Indian Patent Act,1970 recognises the

[143] Provisions of Paris Convention for the protection of Industrial Property, 1883, http://www.wipo.int/treaties/en/text.jsp?file_id=288514.
[144] Agreement on Trade-Related aspects of Intellectual Property Rights, http://www.cptech.org/ip/wto/trips-art31.html.

principle of compulsory licensing in India and lays down certain conditions that need to be satisfied for the issuance of compulsory licensing. Section 84 of the Indian Patent Act states that it is only after the termination of three years from the day of the grant of patent to the patentee the applicant can request the controller for the issuance of compulsory licensing. This Section specifies three necessary conditions when compulsory licensing can be granted, and those are:

i. When the patented invention has not come up to the reasonable expectation of the public, or
ii. When the public is not able to access the patented innovation at an affordable price,
iii. When the patented innovation is worked outside the territory of India.

Section 92 of the Patent Act of India provides certain other conditions, such as in times of national emergency or dire urgency or non-commercial use of public, where the controller can Suo moto grant the compulsory license in accordance with the notification issued by the Central Government. However, it is desirable to consider compulsory licensing as the last resource, which is to be granted only after all attempts to procure a voluntary license from the patentee have failed. Only after the expiry of the prescribed time limit (6 month has lapsed, an application can be made for compulsory licensing.

Indian laws relating to Intellectual property rights provided for the grant of compulsory license long back. Still, it was only in 2012 that the first compulsory license was granted in India in the landmark case of **Nacto Pharma Ltd vs. Bayer Corporation**[145]. The facts of the case, in brief, are that Bayer Corp was engaged in selling a drug called sorafenib tosylate which was sold under the brand name Nexavar. It was a life-enhancing drug used to treat patients in the advanced stages of kidney and liver cancer. It mainly increased the life span of patients suffering from the last stages of liver or kidney cancer. However, it was not a lifesaving drug. In 2006, Bayer had launched Nexavar and had obtained the patent right for the production of the same.

Subsequently, it was found out that the drug was accessible to only 2% of the population and

[145] Nacto Pharma Ltd v. Bayer Corporation, 2014 SCC OnLine SC 1709.

was sold at an unreasonably high price of Rs 2.8 lakhs per monthly dose. An Indian pharma company named Nacto requested Bayer Corporation for a voluntary license to produce and sell the drug at a relatively low price of Rs 8800 for a monthly treatment out of which a portion of the amount will go to Bayer Corp. However, Bayer refused to accept Natco's request, following which Natco filed an application before the Indian Patents Office for the grant of compulsory license after three years of issuing a patent to Bayer. The Indian Patent Office granted a compulsory license to the Nacto Pharma since all the requisite conditions under section 84(1) of the Indian Patent Act for the grant of the compulsory license were fulfilled. Indian people were of the opinion that Bayer's incompetency to justify the amount involved in the development of Nexavar was the primary reason behind the grant of compulsory licensing.

The controller mainly considered the first two grounds of section 84 as only two percent of the target patients had access to the drug. However, the controller's reliance on the last ground that talks about "the patented invention is not worked in the territory of India"[146] raised concerns as the controller interpreted the expression "worked in territory of India" to mean that the production of the patented product must be in India, or the patentee must license out the patented product to interested third parties to manufacture the same in India. This interpretation leaves behind a dangerous precedent as it would imply that compulsory license can be granted to a product that is available solely by imports and not on domestic manufacturing even though the public's reasonable expectations are being met at an affordable price. Nonetheless, the Nacto vs. Bayer case remains the most cited case in the sphere of compulsory licensing as it stands to be the first case in the world where compulsory licensing has been granted post TRIPS agreement.

The second claim for grant of compulsory license following the case of Nacto vs. Bayer was made in the case of Emcure Pharmaceuticals vs. Roche for a drug called Herceptin. Still, the application was rejected by the Department of Industrial Policy and Promotion (DIPP). In the following case of BDR Pharma vs. Bristol Myers, BDR requested the issuance of a compulsory license for Bristol Myers anti-cancer drug called Dastanib. But the application was rejected on the ground that BDA Pharma didn't have a prima facie case for the grant of license. And, recently in the case of Lee Pharma vs. AstraZeneca, the application made by

[146] The Patents Act, 1970, Section 84(1)(c), No 39, Acts of Parliament,1970 (India).

Lee Pharma was not granted as it couldn't make out a prima facie case. We can see that there is an interconnection between the protection of IP Rights and the issuance of compulsory licenses and hence it is essential to strike a balance between them.

NEXUS BETWEEN COMPULSORY LICENSING AND COMPETITION LAW

The connection joining IP rights and the law of Competition can be best portrayed as a Story of uncomfortable partners. The application and requirement of the law of Competition for IPRs are profoundly influential and fervently discussed. The justification for the discussion mainly arises when the IPR rules, like patent laws and competition laws, look to guarantee a cutthroat commercial center. The imposing business model provided for the Intellectual Property rights bearer can make hindrances to section and lead to adverse power, the maltreatment of which is denied by Competition law. Thus, courts of law, scholastics, and professionals see an inborn clash between the two groups and have customarily tried to adjust the requirement for boosting development by encouraging insurance to make use of proficiency advantages of Open-access Competition. This view, be that as it may, is excessively oversimplified and silly. While Intellectual Property laws award restrictiveness, and during that process can hinder rivalry, both Intellectual Property laws and Competition law share the usual point of empowering advancement, improving consumers' wellbeing, and empowering productivity.

Additionally, Competition Law helps in forestalling the maltreatment of selectiveness in specific conditions. It has been proven through the banning of Exclusivity agreements where ventures in an upward relationship appreciate market power or where a predominant undertaking forces exclusivity courses of action. It is likewise shown in the fundamental judgment of ***Consten and Grundig v. Commission***[147]. Here, in this case, the court recognized the presence of an Intellectual Property right and the inappropriate exercise of something similar. Appropriately, Intellectual Property rights and competition law are being seen as corresponding.

[147] *Consten and Grundig v. Commission*, (1966) Case 56/64.

NATURE OF COMPULSORY LICENSING AND COMPETITION LAW

A divestment of IP assets could be deemed a remedy for anti-competitive activity, much as it is usually considered proper for a competition authority to compel disposal of physical assets as a condition to accepting an otherwise anti-competitive merger. Nevertheless, both in the European Union and the United States, the history of non-merger compulsory licensing by competition regulators has been uneven and in conflict with the present worldwide view of Intellectual Property laws and competition rules. Despite identical restrictions in Intellectual Property laws, competition officials in different states have given forced licenses under the competition provisions of their statutes[148].

Licensing has been made mandatory during situations of a harmful refusal for supplying, addressing the counter cutthroat works coming about because of the selectiveness conceded by an Intellectual Property right, and where denial forestalls interest for another item. A careful investigation is performed in the middle of the need to energize advancement and the objective of advancing and cultivating competition.

The Indian Context:

If we talk about the Indian setting, we cannot confidentially say when the "CCI" will provide a permit for licensing though the Act provides power under sections 27 and 28. After investigating contracts or abuse of a position of dominance, the commission can give commands under Section 27of the Act. The Competition Commission may consider issuing a compulsory licenses order under "Section 28" for correcting a situation in which Intellectual Property exclusivity has been used to gain undue power. The commission could also arrange for the divestment and transfer of property ownership, particularly IP rights, under section 28. While under the previous government, the Competition Act, like other governments across the world, focuses on corporations only when they are dominant and prevents misuse of their dominance. This shift in method reflects India's transforming socio, economic, and political views. That kind of method, particularly considering the Controller's decision in the case of such a methodology, particularly considering the Controller's choice in ***Natco v Bayer***, leads to genuine worry that the CCI might consider the award of a necessary permit during the non-

[148] Study concerning Mandatory Licensing Granted by World Intellectual Property Organization's member states to tackle Anti-competitive Uses of Intellectual Property Rights.

existence of any unusual conditions and that customer wellbeing or communist contemplations might slant the harmony between the security of Intellectual Property and free competition. Mandatory licensing under Intellectual Property laws is allowed upon open revenue contemplations using mandatory licenses based on public benefit concerns. On the other hand, under "Competition Law," they are frequently granted because they need to re-establish an efficient, competitive market. According to the Competition Act, a firm is accused of misusing its superior role by imposing unreasonable prices, limiting the goods' manufacturing of products and services, restricting the products' technological and scientific advancement, and refusing access to the market.

IS REFUSING TO ISSUE A LICENSE AN UNFAIR BUSINESS PRACTICE?

It is a common rule that IPR-acquired monopolies are not bad. In the case ***SCM v. Xerox 24***[149] the Circuit Court failed to hold Xerox liable for anti-trust violations based on its unwillingness to license its patents to competing manufacturers of blank paper copy machines, even though patents had previously been licensed to companies that created coated paper copiers.

Be that as it may, there are certain exemptions for this standard; in the case of ***Eastman Kodak Co v. Picture Technical Services, Inc***[150], the Court expressed that authority acquired through some regular and legitimate benefit like patents, copyrights, and business astuteness can lead to risk if a vender takes advantage of his prevailing situation in one market to grow his domain into the following. However, there is no known case where the Court of law has held a company liable for anti-trust violations because of a unilateral refusal to sell or license copyright or patent. Because the patent holder is acting within the context of patent laws, this cannot be considered Exclusionary conduct.

In European countries, however, the Essential Facilities Doctrine has been adopted in the context of intangible asset lawsuits by Europe's anti-trust authorities. “As per this approach,

[149] *SCM v. Xerox24*, 645 F.2d 1195 (2d Cir. 1981).
[150] *Eastman Kodak Co v. Picture Technical Services, Inc*, 504 U.S. 451, 480 n.29 (1992).

if it is necessary to promote successful competition, a dominating corporation may be forced to offer competitors access to one of its inputs."[151] The India patents act permits a cross-license, although this might lead to anti-competitive patent licensing practices. As a result, using the broad power given to the Competition Commission of India under the Competition Act, an equilibrium among IPRs and competition legislation is required.

COMPULSORY LICENSING: A LEGITIMATE CURE TO EXPLOITATION OF IP RIGHTS

There is a notion that competition law and Intellectual Property Rights share a harmonious relationship, and both of them seek to boost competition and invention in the market. However, some jurists don't agree to this theory and believe there is a disparity between competition law and IP rights. The safeguard and exclusiveness bestowed by IP rights are immune from the application of anti-trust laws. The protection provided by intellectual property rights grants monopoly status to the IP holders. There are many chances that the IP holders could misuse or exploit their rights to the disadvantage of the general public.

"Compulsory licensing is a fundamental tool that developing countries may use in certain circumstances to ensure that poor people have access to necessary medicines."[152] The prime objective of compulsory licensing is to ease availability to pharmaceutical drugs as issuing of compulsory licenses to interested third parties in the market for whatever reason provides greater access to life-saving drugs. "The grant of compulsory licenses by developing countries is founded on the premise that higher levels of patent protection would lead to deterioration of public health on account of lack of access to essential drugs."[153]

Let us say, for example, the patentee of a life-saving medicine may misuse his monopoly

[151] T. F. Cotter (2008), Essential Facilities Doctrine, University of Minnesota Law School, Legal Studies Research Paper. p. 08-18.
[152] Alberto do Amaral Junior, Compulsory Licensing and Access to Medicine in Developing Countries, SELA 2005 Law and Poverty. -Panel 5: Poverty and the International Order, Rio de Janeiro, Brazil--16-19 June 2005 (2005), available at http://www.law.yale.edu/documents/pdf/Compulsory_Licensing.pdf (last visited Jun 2, 2014).
[153] Anthony P Valach Jr, TRIPS: Protecting the rights of patent holders and addressing public health issues in developing countries, 4 J. Intell. Prop. 156 (2004).

rights by selling the drug at an unreasonably high price or by refusing to sell his drug commercially. In such a situation, it becomes vital for the State to grant compulsory licenses of the drug to other players in the market to safeguard public health. As we know, the consent of the patent holder is immaterial in a case where the State grants the compulsory license for the production, use and sale of such drug. Nonetheless, the issuance of the compulsory license by the State is an exception and not a rule and must be the last resort of the government on the grounds of emergency, as discussed earlier.

Many companies acquire a lot of other companies just to obtain Intellectual Property Rights. This acquirement of IP rights is not wrong per se as long as it doesn't violate anti-trust provisions. IPRs are spared from the implementation of Section 3 of the Indian Competition Act. However, the abuse of dominant position provided under Section 4 of the Competition Act, 2002 can always be alleged against any group or enterprise involved in anti-competitive practices. This particular Section has a broad application and scope as it encompasses a lot of anti-competitive practices. This Section can charge any IP holder engaged in imposing excessive prices and discriminatory conditions. For example, in the case of Nacto vs. Bayer, the compulsory license granted to Nacto for sale, production and use of Nexavar could also have been brought under the scope of competition act since Bayer was involved in restricting the manufacture of the life-enhancing medication as it was only reachable to 2% of the potential patients and the high price charged by it was violating Section 4 (2) a (ii) of the Competition Act,2002.

Compulsory licensing is an essential tool to make sure that a sufficient number of manufacturers and producers are present in the market to satisfy the wants of public, promote competition, and ensure consumer protection. People who believe that it hampers the impetus for innovation fail to acknowledge the fact that "with every right there comes a corresponding duty." Moreover, when there is a failure in the performance of that duty, it might lead to erosion in law. Competition Act of 2002 comprises provisions that are adequately broad to tackle exploitation of IP rights, and compulsory licensing is the right cure to control this, though only in certain extraordinary cases.

Compulsory licensing is preferred as a means by international covenants for advancement in progressing and under-developed countries. "Doha Declaration on Agreement on Trade-

Related aspects of Intellectual Property Rights and Public Health states that we recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."[154] Hence, we can conclude that compulsory licensing is an effective remedy for checking abuse of Intellectual property rights and restrictive tactics undertaken by the companies to affect competition.

IMPACT OF COMPULSORY LICENSING ON COMPETITION LAW

Dominance is acceptable as long as it doesn't result in abuse. An effective competition mechanism can provide a remedy that would help check anti-competitive agreements and boost the economy and consumer protection. "Hence, competition law steps in to prevent such a monopoly situation from getting deep-rooted in the market, and the concept of compulsory licensing is conceived from here in certain specialized cases."[155] The main aim of having an efficacious competition regime is to prevent abuse of dominant position held by the monopoly holder and using it unfairly to the deterioration of the public.

"Compulsory licensing promotes healthy competition as it requires the license seeker to pay a certain fee to the patent holder."[156] The fee paid to the patentee acts as an additional income, and it also helps in retrieving the costs gone into the manufacturing of the product. Moreover, it enhances the cost of production as it is an additional cost for the license seeker willing to supply the same product in the market. Hence, it helps to maintain an equitable balance in the market, thereby protecting the interests of all the shareholders.

There is a doctrine named 'Essential Doctrine' developed by the European courts, which aids in deciding in which circumstances compulsory license should be granted and helps create a requisite equilibrium between IPR protection and safeguarding competition. The Indian

[154] "http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#public_health, Accessed on 27 November 2012."
[155] Pantopoulou E. The Status and Legal Effect of Compulsory License in Investment Law, International Journal Of Law (Jol), 2019.
[156] Available from: https://www.ucl.ac.uk/cles/sites/cles/files/ cles 4 2013new.pdf.

Competition Act of 2002 provides broad powers to the Competition Commission of India to charge fines on companies engaged in anti-competitive practices as given in the Act. Section 27 (g) and 28 (2) of the Act extensively cover the power of CCI to grant compulsory licensing within its ambit.

On the other hand, there are arguments that compulsory licensing poses a threat to competition especially in nations where innovation has been stagnant. In advancing and under-progressing nations, compulsory licensing can be granted in specific market sectors to enhance competition where a monopoly holder abuses its dominant position. However, it might result in hampering innovation in the future and is anti-competitive. There are reasonable chances for Foreign direct investment to see a downfall if compulsory licensing becomes a regular course of action for controlling the abuse of IP rights and monopolistic practices. Thus, as discussed earlier in this research project, compulsory licensing must only be used as a last resort in exceptional circumstances.

CONCLUSION

This might be reasonably concluded from the preceding explanation that if a firm's rights are protected under IP laws, misuse of Intellectual Property rights PR is a very real possibility. Though the monopolies secured by IPRs are legal, the truth remains that it is extremely vulnerable to exploitation. Organizations are frequently inclined to engage in anti-competitive and "exclusionary activities", attempting to extend their monopoly into sectors where they lack IPR protection. IPR protection is in place for software titans like Microsoft, seed producers like Mahyco Monsanto Biotech, and pharmaceutical producers, and most of the time, these businesses are sole proprietorships. Such monopolies propel these businesses to impose their conditions throughout the whole sector that might be exploitative at times of the laws of free competition.

Compulsory licensing can be considered as a viable solution during these kind of situations with a significant amount of public interest and anti-competitive activities. Legally speaking, businesses frequently harmed interests of customers and competitors. Public health, public order, and national security are important questions to be answered but many countries viewed

it as a countermeasure to anti-competitive activities. To some extent, the idea that Compulsory licensing promotes competition is correct, particularly in nations wherein invention or development is lacking. These emerging and under-developed nations may do this for increasing competition in particular markets in which a single company is abusing its dominating position, but in the long run, this could for innovation and hence become anti-competitive. As a result, like stated before, compulsory licensing should only be used in rare circumstances.

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ROLE OF PATEMTABILITY IN COVID VACCINES

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INTRODUCTION

In today's modern world vaccine is protected by multiple levels of IP often licensed from multiple partners. As an international medical humanitarian organization, vaccination is a key part of getting rid of the virus also known as the coronavirus. After the introduction of the first vaccine, many companies started running fast to create a more efficient vaccine and register their domain patent which eventually this competition helped society to get more effective and safe vaccine. Nonetheless, considering the persisting conditions where nations vaccination program is hustling a lot quicker than creation, the principle question that emerges is how could vaccine enterprises set increase its Coronavirus vaccine creation up to supply vaccines to the leftover millions individuals when intense deficiency is obvious in the past program of immunizing previously mentioned need gatherings? This article will endeavor to answer this inquiry by featuring the choices accessible that how licensing regulations have assisted the huge pharmaceutical enterprises with creating vaccines in Coronavirus virus pandemic as far as arrangements contained in the Licenses Act, 1970 and game plans set up in other creating and created countries across the globe.

As of now, the Focal Medications Standard Control Association (CDSCO) which is India's medication controller has endorsed two vaccines for crisis use-Covishield and Covaxin.

The previous for example Covishield, which has been created by the English Swedish medication creator AstraZeneca regarding Oxford College, is being delivered locally by the Serum Foundation of India ("SII" for curtness), the world's biggest vaccine producer, for the stock of the vaccine to the Indian Government and furthermore to an enormous number of nations all over the planet. The College of Oxford holds the patent for the vaccine innovation, which is utilized in Covishield, and AstraZeneca has thus gone into a permit concurrence with SII to share the said innovation. Albeit, the creation limit of SII is promising, it will make some intense memories meeting the two its public and global commitments.

Literature Review:

Rimmer in his work "**Intellectual Property and Biotechnology Biological Inventions**" examines how a number of significant nations have dealt with the legal issues of biological innovations. "Patent law should be technology-specific, especially when dealing with the demands of certain sectors of biotechnology," and "patentability standards should be implemented rigidly in respect of new technologies," according to the author.

Firdos Khan in his book **Biotechnology Fundamentals 2** mentioned conventional and unique approaches to IPR industry. This book is single source referring every aspects of biotechnology.

WIPO Intellectual Property Handbook analyses of all fields of intellectual property, its administration, enforcement and teaching, technological and legal developments, and WIPO's work in its Member States.

Mitsuo Matsushita, Thomas J. Schoenbaum in his book **The World Trade Organization Law, Practice, and Policy** examines the effect of the WTO on national legislation and its interaction with other areas of law, such as competition law and intellectual property.

Rick Ng in his book **Drugs: From Discovery to Approval, 2nd Edition** draws the reader's attention on processes involved in bringing a drug to the market, including the performance of preclinical trials

Statement of Problem:

The significant role of patenting is disclosure of invaluable knowledge about patent innovation for public promulgation. This actually assists naïve innovators to learn from existing patent and create advance innovation which can contribute more. Biological Innovations become extremely ambiguous in terms of eligibility or the appropriateness of imposing monopolies on them, posing patentability issues. In light of such pressing issues, it is appropriate to analyse the readiness or preparation of the Indian patent system in confronting or resolving the aforementioned issues.

Objectives

1. To comprehend the Biotechnical meaning of vaccine and IPR related to it.
2. To analyze the legal framework to Pharma-Biochemical patenting.
3. To understand Patentability criterion of Pharma-Biochemical Technology.
4. To observe the inadequate Pharma-Biochemical licensing.

Hypothesis

The provisions of Indian patent law are insufficient to address the patentability and eligibility issues that have arisen as a result of biotechnology advancements in the pharmaceutical business.

Research Methodology:

The work of researcher's is purely doctrinal. Researcher's strives to emphasis on how diverse conundrums or challenges are navigated, avoided, or dealt with elsewhere, and use it to carve out or propose a feasible answer for India.

BIOLOGICAL MEANING OF VACCINES

Biologically stating "A vaccine is a preparation that improves immunity to a particular disease. It typically contains an agent that resembles a disease-causing microorganism and is often made from weakened or killed form of the microbe. The agent stimulates the body's immune system to recognize the agent as foreign, destroy it, and remember it, so that the immune system can more easily recognize and destroy any of these microorganisms that it later encounters."[157]

Therefore, technically Vaccine is defined as "a preparation of dead or weakened pathogens, or of derived antigenic determinants, used to stimulate the production of antibodies or immunity against the pathogens"[158] in technical terms. "Several forms of vaccines,"[159] according to biotechnology literature, includes:

Attenuated Vaccines: These vaccines contain "live, attenuated virus microorganisms."[160] Here the "virulence of a pathogen" is reduced (i.e. "attenuated")[161] Virulence means "the degree of ability of an organism to cause disease"[162]

Killed Vaccines: When "chemical and temperature treatment are normally used to kill or inactivate the pathogen", these are made.[163]

Toxoids: These "are derived from the toxins secreted by a pathogen" [164]

Other kinds: There are so-called "Sub-unit vaccines" which contain "a fragment" of the microorganism, which can also "create an immune response."[165] Reportedly, there are various "vaccines currently in the developmental stage or which are already in use, such as

157 Firdos A. Khan, Biotechnology Fundamentals 2 (CRC Press, Florida, 2012) at 307.

158 FAO, "Glossary of Biotechnology and Genetic Engineering" 31 (1999) at 240.

159 S. Arora and Rekha Chaturvedi, "Section 3(d): Implications and Key Concerns for Pharmaceutical Sector" 21 JIPR 16-26 (Jan., 2016), 17 at 268.

160 Supra Note 4 at 97.

161 Rick NG, Drugs: From Discovery to Approval 94 (Wiley-Blackwell, New Jersey, 2nd Edn., 2009)

162 Supra Note 5 at 243.

163 Supra Note 8 at 97.

164 ibid

165 Supra Note 4 at 269

recombinant vector vaccines, DNA vaccines"[166] etc.

As above mentioned, because vaccines incorporate "live," "dead," or even "attenuated" germs, some of which are usually transgenic, monopolisation or even bio stealing issues arise.

STATUTORY FRAMEWORK OF PHARMA-BIOCHEMICAL TECHNOLOGY PATENTING.

The Patent Act, 1970

In India the statute which regulates patenting is "The Patents Act, 1970." It states that "patent means a patent for any invention granted under this Act."[167] Also, "invention" signifies "a new product or process involving an inventive step and capable of industrial application."[168]Certain subject-matter is disqualified as "not inventions within the meaning of this Act."[169]

Also, "the Controller General of Patents, Designs and Trade Marks" (henceforth, CGPDTM) "appointed under sub-section (1) of section 3 of the Trade Marks Act, 1999 (47 of 1999), shall be the Controller of Patents."[170]

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166 ibid

[167]The Patents Act, 1970 (Act 39 of 1970), section 2(1)(m) "patent" means a patent for any invention granted under this Act.

[168]Ibid section (2) (1) (j) "invention" means a new product or process involving an inventive step and capable of industrial application;] [(ja) "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.

[169] Ibid section 3 (c) the mere discovery of a scientific principle or the formulation of an abstract theory [or discovery of any living thing or non-living substances occurring in nature];

[170] Controller and different officers. -

(1) The Controller General of Patents, Designs and Trade Marks designated under sub-area (1) of 160 [section 3 of the Trade Marks Act, 1999 (47 of 1999)], will be the Controller of Patents for the reasons for this Act.

(2) For the motivations behind this Act, the Focal Government might select as numerous analysts and different officers and with so much assignments as it might suspect fit.

(3) Dependent upon the arrangements of this Act, the officers designated under sub-area (2) will release under the administration and headings of the Controller such elements of the Controller under this Act as he may, now and again by general or exceptional request recorded as a hard copy, approve them to release.

(4) Without bias to the generality of the arrangements of sub-area (3), the Controller may, by request recorded as a hard copy and because of motivations to be recorded in that pull out any matter forthcoming before an officer selected under sub-segment (2) and manage such matter himself either once more or from the stage it was so removed or move something similar to one more officer named under sub-segment (2) who may, dependent upon extraordinary headings in the request for move, continue with the matter either again or from the stage it was so moved.

The Paris Convention

"The countries to which this Convention applies constitute a Union for the protection of Industrial property."[171] The "period of priority" for patents is set at "twelve months."[172] It further states that "patents applied for in Union nations" are "independent of patents for the same invention applied for in other countries." As a result, a negative decision (such as revocation) in one nation does not always lead to or prompt a similar decision in another. "The inventor should have the right to be mentioned as such in the patent," it further states. It also provides for "compulsory licensing."

Patent Cooperation Treaty

It attains "Rationalization and cooperation with regard to the filing, searching and examination of patent applications and the dissemination of the technical information contained therein." PCT requires an "international application" to be lodged in three copies at a "Receiving Office"70 (or R.O.) that "will inspect and process it." All "Contracting state or states in which protection for the innovation is required" must be mentioned in the "international application." These are referred to as "designated states." The receiving office shall keep one copy of the international application (home copy), submit one copy (record copy) to the International Bureau, and transmit another copy (search copy) to the competent International Searching Authority." The last entity, the "International Searching Authority," merely performs an "international search" with the goal of "discovering relevant previous work." An "International Search Report" is sent by the "International Searching Authority" to the applicant and the "International Bureau" on the basis of this. "The applicant can evaluate his odds of acquiring a patent in or for the countries specified in the worldwide application," according to the paper. "The international bureau shall publish the international application," says another clause. An "International Preliminary Examination" may also be requested by the applicant. Its goal is to "formulate a preliminary and non-binding judgement on whether the claimed invention seems to be original, innovative, and industrially relevant." "This evaluation gives the applicant a better foundation for assessing his chances of getting a patent, and it gives the elected officials a better basis for deciding whether or not to grant a patent."

[171] Paris Convention, 1883, Article 1.1
[172] Id Article 4(C)(1)

Trade Related Aspects of Intellectual Rights (Trips)

a. Most-Favoured-Nation Treatment clause: “Each member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention.”[173]

b. Obligation of Paris Convention: The members should comply with pertinent paragraphs of the “Paris Convention" when it came to patents. TRIPS further states that "nothing" in the agreement "shall derogate from any existing responsibilities that Members may have to each other under the Paris Convention." As a result, it effectively made that convention obligatory.

c. The Exhaustion Rule: “Subject to Articles 3 and 4, nothing in this Agreement shall be utilised to address the issue of intellectual property rights exhaustion." This exhaustion rule is founded on the notion of "First Sale," which states that "after a patented object has been sold anywhere under the patent holder's authorization, the patent holder has no right to restrict subsequent sale or importation elsewhere in the globe" Simply said, the holder's IPRs are exhausted after the first sale.

Apart from, obviously, Supreme Court and High Court judgements would inevitably rely on, amongst alia, its practises and manuals/guidelines in the Indian context.

PATENTIBILITY

Indian law says that an “invention means a new product or process involving an inventive step and capable of industrial application”[174]. TRIPS, likewise, says that “patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are” inter-alia “new”[175] . In India judiciary has additionally thought that, "the essential guideline of patent regulation is that a patent is allowed uniquely for a creation which should

[173] TRIPS, 1994, ArtArticle 3.1
174 The Patents Act, 1970 (Act 39 of 1970), s. 2(1)(j)
175 TRIPS, 1994, Art. 27.1

be new and valuable. In other words it should have oddity and utility"[176][177]. Albeit obviously oversimplified, checking such "curiosity" or originality requires correlation with supposed "earlier craftsmanship" or "cutting edge"

Original & Naive Innovations:

"New invention" is defined as "any invention which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art". In India, the provision lays down that, "the invention or technology must not have been previously made and used in India,"[24].

Something which already exists or is already being done can't be monopolized. Also, bringing out rationale for "novelty" as also its difference with "obviousness/inventive step", it is pointed that, "For a claim to be anticipated by prior disclosure, the prior disclosure must contain a clear description of, or clear instructions to do or make, something that would infringe the patentee's claim if carried out after the grant of the patentee's patent. If on the other hand, the prior publication contains a direction which is capable of being carried out in a manner which would infringe the patentee's claim, but would be at least likely to be carried out in a way which would not do so, the patentee's claim will not have been anticipated

Indian Practice

Interestingly, IPO keeps up with that "a development is viewed as new in the event that it isn't expected by earlier distribution, earlier use or earlier open knowledge."[178] Consequently, even "earlier open information" annihilates curiosity. The distribution can be "in India or somewhere else in any document"[26]. Initial public offering additionally says that "earlier workmanship implies all that has been distributed, introduced or in any case revealed to the general population before the date of documenting of complete specification."[27] It additionally says that "to decide curiosity, an application for patent documented at the Indian Patent Office

176 M/s Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries (1979) 2 SCC 511, 518

177 Supra 9 and 6 § 102 (a)(1). Other sub-sections lay exceptions etc. which are irrelevant given our ambit.

178 Office of CGPDTM, "Manual of Patent Office Practice and Procedure" (Mumbai, March 22, 2011) (henceforth "MPOPP"), 77-78 available at

before the date of recording of complete determination of a later documented application however distributed after the equivalent is considered for the reasons for earlier claiming"[28]. Moreover "earlier craftsmanship ought to reveal the creation either in unequivocal or implied way" and "will be expectant on the off chance that every one of the highlights of the development under assessment are available in the refered to earlier art"[29]. For this evaluation, joining or "mosaicking of earlier craftsmanship reports isn't followed". Initial public offering likewise makes reference to that "nonexclusive divulgence" probably won't annihilate "curiosity of explicit exposure" however "explicit revelation" decimates "oddity of a conventional disclosure"

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IPO, in its different Biotech guidelines[30], says that, "if there should be an occurrence of biotechnological developments, the evaluation of oddity will be completed in a similar way concerning other inventions". Consequently, up to cited rules[31] will apply thus. Rules furthermore say that, "A case to an item acquired or created by a cycle is expected by any earlier revelation of that specific item essentially, no matter what its strategy for production". Obviously, for pharma-biotech, no unmistakable or separate standards/principles exist as respects originality assurance. Additionally, its assurance shows up all around settled and unproblematic with comparable standards/practices all over the place. We, consequently, presently draw in with the second necessity.

INADEQUATE LICENSING MECHANISM

Current licensing components deficient Voluntary licenses have not and won't stay up with public health interest. Since organizations decide the conditions of intentional licenses, they are regularly conceded to LMICs that can bear the cost of them, leaving out more unfortunate regions[179]. For instance, in South Asia, AstraZeneca has will fully authorized its vaccine to the Serum Institute of India, despite the fact that the locale has various skilled vaccine

179 Irwin A. What it will take to vaccinate the world against covid-19. Nature 2021;592:176-8

manufacturers[180]. Many Coronavirus vaccine designers have not made strides towards licensing their advances, essentially in light of the fact that there is restricted monetary motivator to do so[181]. To date, none have imparted IP safeguarded vaccine data to the WHO Covid-19 Technology Access Pool (C-TAP) laid out keep going year[182]. Relying on the ethical compass of organizations that solution to investors to deliberately permit their advances will have restricted impact on vaccine value. Their market is driven by overall revenues, not public health. Mandatory licensing by LMICs will likewise be lacking in quickly growing vaccine creation, as each patent permit should be haggled independently by every country and for every item founded on its own legitimacy. From 1995 to 2016, 108 necessary licenses were endeavored and just 53 were approved[183184]. The made to order approach is slow and not reasonable for a global crisis that requires quick activity. What's more, TRIPS requires necessary licenses to be utilized prevalently for homegrown stockpile, restricting commodities of the authorized goods to local low pay nations without creation capacity[185]. Although a "unique" mandatory permit framework was concurred in the Doha presentation to take into account quick exportation and importation (formalized as the article 31bis amendment to TRIPS in 2017), the arrangement is restricted by bulky calculated strategies and has been seldom used[186]. Governments may likewise be reluctant to seek after obligatory licenses as big league salary nations have recently harassed them for doing as such. Since India initially utilized necessary licensing for sorafenib tosylate in 2012 (lessening the disease medication's

180 Vaccine patents, global equity and how to vaccinate the world. WBUR, 24 Mar 2021. https://www.wbur.org/onpoint/2021/03/24/how-to-equitably-vaccinate-the-world

181 Morten C, Herder M. We can't trust big pharma to make enough vaccines. Nation 2021 May 31. https://www.thenation.com/article/world/covid-vaccines-pharma/

182 Safi M. WHO platform for pharmaceutical firms unused since pandemic began. Guardian 2021 Jan 22. https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firmsunused-sincepandemic-began

183 Son KB, Lee TJ. Compulsory licensing of pharmaceuticals reconsidered: Current situation and implications for access to medicines. Glob Public Health 2018;13:1430-40. doi: 10.1080/17441692.2017.1407811 pmid:

184 Ibid. This also follows from supra 6 s. 13

185 World Trade Organization. TRIPS agreement. 1994. https://www.wto.org/english/docs_e/legal_e/27trips_02_e.htm

186 Garrison C. Never say never - why the major league salary nations that quit from the Workmanship. 31bis

WTO TRIPS framework should desperately reexamine their choice notwithstanding the Coronavirus pandemic. Medications Regulation and Strategy 2020 Apr 8. https://medicineslawandpolicy.org/2020/04/never-sayneverwhy-the-big time salary nations that-quit from-the-craftsmanship 31bis-wto-trips-framework musturgentlyrethink their-choice despite the-Coronavirus pandemic/

cost by 97%), the US has reliably compelled the country not to utilize further mandatory licences[187]. During this pandemic, Gilead sued the Russian government for giving an obligatory permit for remdesivir[188].Furthermore, while necessary licenses are principally for licenses, Coronavirus vaccines regularly have different sorts of IP, including proprietary advantages, that are indispensable for production[189]. The emergency TRIPS waiver eliminates all IP as a barrier to beginning creation (not simply licenses) and invalidates the delayed time, irregularity, continuous disappointment, and political strain that go with deliberate licensing and mandatory licensing endeavors. It likewise gives a quick way to new providers to import and product vaccines to nations deprived without administrative constraints. At long last, there is no unquestionable proof that the proposed TRIPS waiver would destroy the IP framework and its development motivations. The waiver is confined to Coronavirus related goods and is time restricted, assisting with safeguarding future advancement. It would, nonetheless, lessen overall revenues on current Coronavirus vaccines. With significant income in the principal quarter of 2021, many medication organizations have as of now recovered their research and improvement costs for Coronavirus vaccines[42]. However, they have not been the sole financial backers in vaccine advancement, and they ought not be the only ones to benefit. Most vaccines got a significant part of their immediate financing from governments and not-for-benefit organizations-and for some's purposes, like Moderna and Novavax, almost all[43]. Decades of publicly supported research have laid the basis for ebb and flow developments behind the scenes innovations utilized for vaccines [190]. Given that organizations were allowed forthright gamble assurance for Coronavirus vaccine research and improvement, a waiver that propels

187 Médecins Sans Frontières. A timeline of US attacks on India's patent law and generic competition.2015. https://msfaccess.org/sites/default/files/201810/IP_Timeline_US%20pressure%20on%20India_Sep%202014_0

.pdf

188 Gilead sues Russia: private company challenges a country 's right to protect public health. Make Medicines Affordable, 2021. https://makemedicinesaffordable.org/gilead-sues-russia-privatecompany-challenges-acountrys-right-to-protect-public-health/

189 Contreras J. US Support for a WTO waiver of covid-19 intellectual property – what does it mean? Bill of Health, 2021. https://blog.petrieflom.law.harvard.edu/2021/05/07/wto-waiver-intellectualproperty-covid/ [42] Buchholz K. Covid-19 vaccines lift pharma company profits. Statista 2021. https://www.statista.com/chart/24829/net-income-profit-pharma-companies/ [43] Covid vaccines: Will drug companies make bumper profits? BBC News 2020 Apr 22. https://www.bbc.com/news/business-55170756

190 Cross S, Rho Y, Reddy H, etal. Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine? Approximating the funding to the University of Oxford for the research and development of the ChAdOx vaccine technology. [Preprint.] medRxiv 2021 ;2021.04.08.21255103. doi: 10.1101/2021.04.08.21255103

global public health however diminishes vaccine profits in a global crisis is reasonable.

CONCLUSION

In today's world where vaccine which has been protected the entire world is being protected by multiple of IP which is being licensed from multiple developers and partners. Many Coronavirus vaccine designers have not made strides towards licensing their advances, essentially in light of the fact that there is a restricted monetary motivator to do so. while necessary licenses are principally for licenses, Coronavirus vaccines regularly have different sorts of IP, including proprietary advantages, that are indispensable for production. To date, none have imparted IP safeguarded vaccine data to the WHO Covid-19 Technology Access Pool (C-TAP) laid out to keep going year. Relying on the ethical compass of organizations that solution to investors to deliberately permit their advances will have a restricted impact on vaccine value. Their market is driven by overall revenues, not public health. Mandatory licensing by LMICs will likewise be lacking in quickly growing vaccine creation, as each patent permit should be haggled independently by every country and for every item found on its own legitimacy. Otherwise, if countries follow this type of approach, then production and innovation regarding vaccines would be slow and not reasonable for a global crisis where the globe wants quick activity. We are in the middle of one of the largest vaccination efforts in human history. We cannot rely on companies to thread the needle of corporate social and moral responsibility with shareholder and stock value returns nor expect impacted governments to endure lengthy bureaucratic licensing processes in this time of crisis. It will be a legacy of apathy and unnecessary death. Instead, there should be strong competition among the country where every individual country is competing to save the world.

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THE CONUNDRUM OF ARBITRABILITY OF INTELLECTUAL PROPERTY RIGHTS DISPUTES IN INDIA: AN ANALYSIS

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ABSTRACT

The article endeavours to delve into the conundrum that is of the arbitrability of IPR disputes in India. Not only is the issue still moot but also the Indian Courts have delivered pendulum-like decisions which reach two extreme ends. On the one hand, the arbitrability of the disputes has been altogether rejected by the Courts whilst on the other, the Courts have plausibly adopted a pro - arbitration approach to cull out an exception which may permit the arbitrability of such disputes. Apart from the aforementioned, the Courts have opined different and confusing tests and standards for determining whether the IPR disputes may be referred to arbitration. These tests include the relief test, the standards laid down in Vijay Drolia, amongst other. Apart from evaluating the arguments from and against the arbitrability of IPR disputes which have been elucidated in various court decisions, this article endeavors to analyse the literature on the extant issue too. The article highlights the importance of a pro-arbitration approach in India with regard to encouraging foreign parties to deal in business with Indian parties. Not only that, it is imperative for Indian courts to match the standards of the international community and also to honor its commitments under the international conventions. Lastly, the article concludes and provides suggestions for improving the Indian position on the arbitrability of IPR disputes in India.

LEGISLATIVE INTENDMENT ON ARBITRATION AND INTELLECTUAL PROPERTY RIGHTS (IPR)

Section 2(3) of the Arbitration and Conciliation Act, 1996 provides that certain disputes may not be submitted to arbitration and Section 34(2)(b)(i) provides that courts may set aside arbitral awards where the subject matter of the dispute was not capable of settlement by arbitration. The Act defines 'international commercial arbitration[191]' to mean and include any dispute of commercial nature arising between the Indian party and International party. The definition of the term 'commercial dispute' in the Commercial Courts Act, 2015 specifically includes disputes pertaining to Intellectual property[192]. In addition, Section 10 of the Commercial Courts Act provides for arbitration of commercial dispute without specifically ousting arbitration of IPR disputes from its purview. Lastly, nothing in the Arbitration Act prevents the enforcement of awards concerning Intellectual Property Rights including the question of their validity or infringement. The Indian Patent Act, 1970 allows for arbitration of matters only involving government[193].

JUDICIAL INTERPRETATION

In the case of ***Vidya Drolia v. Durga Trading Corporation[194]*** (hereinafter 'Vijay Drolia') the Apex Court propounded a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

1. When cause of action and subject-matter of the dispute relates to actions in rem.
2. When cause of action and subject-matter of the dispute affects third party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.
3. When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

[191] Arbitration and Conciliation Act, 1996, § 2(1)(f), Acts of Parliament, 1996 (India).

[192] The Commercial Courts Act, 2015, § 2(1)(xvii), Acts of Parliament, 2015 (India).

[193] Patents Act, 1970, § 103(5), Acts of Parliament, 1970 (India).

[194] Vijay Drolia v. Durga Trading Corporation, MANU/SC/0939/2020.

4. When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The three categories to be adjudicated by the Court were opined in *Boghara Polyfab Private Limited*[195]. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statue(s).

Therefore, it is settled position that in before referring the dispute to arbitration[196], the Courts are empowered to evaluate the arbitrability of disputes and may not refer the dispute to arbitration if the grounds enumerated in Vijay Drolia are not fulfilled.

INTELLECTUAL PROPERTY RIGHTS AS RIGHTS IN REM

A right in rem is a right exercisable against the world at large[197]. A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided[198]. Such a judgment "settles the destiny of the res itself" and binds all persons claiming an interest in the property

[195] Boghara Polyfab Private Limited MANU/SC/4056/2008: (2009) 1 SCC 267.

[196] Arbitration and Conciliation Act, 1996, § 8, Acts of Parliament, 1996 (India).

[197] Ramanatha Alyar Advanced Law Lexicon, 3rd Edn.

[198] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., MANU/SC/0533/2011.

inconsistent with the judgment even though pronounced in their absence[199].

The seminal decision of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*[200]. Albeit examined the extant issue but it is noteworthy that the Court did not expressly include IPR in the list of disputes which are non-arbitrable. In fact, it was opined that, "there is no exact answer to non-arbitrability, it is a flexible rule".

Nonetheless, in a catena of judgments, the Courts in India have inclined towards non-arbitrability of IPR disputes. In *A. Ayyasamy vs. A. Paramasivam and Ors.*[201] the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration, these include disputes involving patents, trademarks and copyright. However, this observation of the Court is mere *dicta* as the issue before the Court was of the arbitrability of fraud and the Court premised this observation on an academic book[202] with no legal backing whatsoever.

In *Suresh Dhanuka v. Sunita Mohapatra*[203], it was held that a dispute concerning a right in rem shall be incapable of being arbitrated upon and shall be the exclusive jurisdiction of the courts of the land. The Supreme Court has enunciated that the right in rem includes right in patent and copyright[204]. The Supreme Court in the case of C*hiranjilal Shrilal Goenka (deceased) through LRs. v. Jasjit Singh*[205], held that the action in rem could not be referred to arbitration even by consent of the parties. In *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*[206], the High Court evaluated the entire judicial dicta on the point of arbitrability of rights in rem and concluded that IPR copyright right is a right in

[199] G.C. Cheshire & P.M. North, Private International Law 12th ed. by North & Fawcett London: Butterworth's, 1992, p. 362.

[200] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., MANU/SC/0533/2011.

[201] A. Ayyasamy vs. A. Paramasivam and Ors. MANU/SC/1179/2016.

[202] O.P. Malhotra on 'The Law & Practice of Arbitration and Conciliation', Third Edition, authored by Indu Malhotra.

[203] Suresh Dhanuka v. Sunita Mohapatra, (2012) 1 SCC 578.

[204] Common Cause, A Registered Society v. Union of India, (1999) 6 SCC 667.

[205] Chiranjilal Shrilal Goenka (deceased) through LRs. v. Jasjit Singh, (1993) 2 SCC 507.

[206] Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd., 2016 SCC OnLine Bom 5893.

rem and set aside the award of the arbitrator on this ground.

In *SAIL v SKS Ispat and Power Ltd*[207]., the Bombay High Court dismissed the petition opining further that trademark and the connected rights are in rem and are not open to private forum resolution chosen by the parties like arbitration. *Deepak Thorat v Vidli Restaurant Ltd*[208], the court read Steel Authority of India Case[209] as holding that disputes relating to infringement and passing off were non-arbitrable.

In *IPRS Ltd v Entertainment Network (India) Ltd.*[210] the Bombay High Court had to decide if an arbitral tribunal could rule on the validity on the right of copyright itself. The court holding in the negative stated that allowing the tribunal to decide purely legal issues such as the existence of copyright amounts to a decision on an action in rem which is well settled that the arbitral tribunal has no jurisdiction to decide. The stand was also recognized by Calcutta High Court in *Diamond Apartments Pvt Ltd v Abanar*[211].

Marketing Ltd. Lifestyle Equities C V v. Q D Seatoman Designs (P) Ltd[212] has more clearly dealt with the traditional in rem versus in personam debate. Herein, it was held that patent disputes can be arbitrable if the dispute is about the licensing of a patent or infringement of a patent, but a dispute challenging the validity of the patent will not be arbitrable. In the case of *Emaar MGF Land Ltd. v. Aftab Singh*[213] categorically stated that disputes related to patents, copyright and other Intellectual Properties are beyond the scope of arbitration. However, the issue in the case appertained arbitrability of landlord-tenant disputes, therefore the above discussion is mere dicta.

[207] SAIL v SKS Ispat and Power Ltd., 2014 SCC OnLine Bom 487.

[208] Deepak Thorat v Vidli Restaurant Ltd., 2017 SCC OnLine Bom 7704.

[209] SAIL v SKS Ispat and Power Ltd. 2014 SCC OnLine Bom 487.

[210] Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd., 2016 SCC OnLine Bom 5893.

[211] Diamond Apartments v. Abanar, 2015 SCC OnLine Cal 9348.

[212] Lifestyle Equities CV vs. Q.D. Seatoman Designs Pvt. Ltd. and Ors. 2017(72)PTC 441(Mad).

[213] Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751.

Subordinate rights in personam

Despite the aforementioned, the Courts have culled out the subordinate rights in personam from the rights in rem. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not…..An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless[214]. Moreover, the Supreme Court in *V.H. Patel & Co. v. Hirubhai Himabhai Patel*[215] held that ousting arbitrability, in the face of an arbitration clause, is not something to be lightly assumed. It must be done in limited cases which are clearly non-arbitrable.

Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable[216]. In the welcome decision of *Eros International v. Telemax*[217], the issue appertained copyright infringement, the Court opined that where there are matters of commercial disputes and parties have consciously decided to refer these disputes arising from that contract to a private forum, no question arises of those disputes being non-arbitrable. Such actions are always actions in personam, one party seeking a specific particularized relief against a particular defined party, not against the world at large. The Court elucidated the concept as, "*Take an example. A may allege infringement by B. A may succeed against B. That success does not mean that A must necessarily succeed in another action of infringement against C. The converse is also true. Should A fail in his action against B, he may yet nonetheless succeed in his action against C. this shows the nature of the dispute btw the parties affecting their rights in personam and even if they succeed it does not lead to a declaration in rem*".

Thus, Claim of infringement against a particular person is arbitrable as is subordinate right in

[214] Mustill and Boyd in their 2001 Companion Volume to the 2nd Edition of Commercial Arbitration.

[215] V.H. Patel & Co. v. Hirubhai Himabhai Patel, (2000) 4 SCC 368.

[216] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., MANU/SC/0533/2011.

[217] Eros International v. Telemax, 2016 SCC OnLine Bom 2179.

personam[218]. Where there are matters of commercial disputes and parties have consciously decided to refer these disputes arising from that contract to a private forum, no question arises of those disputes being non-arbitrable[219].

In the case of *Ministry of Sound International v. M/S Indus Renaissance Partners*[220], the Apex Court has opined that disputes pertaining to IPR can be arbitrated upon on premise that there is no absolute bar on arbitration involving questions relating to IPR. A contract providing for arbitration is a commercial document that must be interpreted with a common sense approach rather than with pedantic or legalistic interpretation. The disputes relating to Intellectual Property use and infringement concern only rights-in-personam, and are by that virtue arbitrable.[221]

Contractual Disputes

In another case of *EuroKids International Private Limited vs. Bhaskar Vidhyapeeth Shikshan Sanstha*[222], the Hon'ble Court observed that since there is no dispute about the petitioner's ownership of the trademark and copyright involved in the present case, therefore, the proceedings filed by the petitioner cannot be considered as proceeding in rem. As reiterated in *Hero Electric Vehicles Private Limited and Ors. vs. ELectro E-mobility Private Limited and Ors*[223]., when the disputes pertaining to IPR arise from a contract between the parties, they are arbitrable. Most disputes related to IPR are founded upon a contractual basis and there is no reason for a state to interfere in such relations and exclude the disputes arising therefrom from the domain of arbitration. These disputes are arbitrable even if they arise from

[218] Deccan Mills v. Regency Mahavir Properties (2021) 15 SCC 532; Impact Metals Ltd. and Ors. vs. MSR India Ltd. and Ors. MANU/AP/0646/2016.

[219] Cf. Grandlay Elecs. (India) Ltd. v. Batra, A.I.R. 1999 Del. 1, 2 (upholding the findings of an arbitral tribunal as to ownership of a trademark); O.P. MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION: THE ARBITRATION AND CONCILIATION ACT 1996 142 (2002).

[220] Ministry of Sound International v. M/S Indus Renaissance Partners, 2009 SCC OnLine Del 11.

[221] Affirmed in Lifestyle Equities vs Qdseatoman Designs Pvt. Ltd., 2017(72) PTC 441(Mad); Angath Arts (P) Ltd. v Century Communications Ltd., 2008 SCC OnLine Bom 475.

[222] EuroKids International Private Limited vs. Bhaskar Vidhyapeeth Shikshan Sanstha, Arbitration Petition No.1061 OF 2014.

[223] Hero Electric Vehicles Private Limited and Ors. vs. ELectro E-mobility Private Limited and Ors., MANU/DE/0379/2020

a contract concerning registered IPR[224].

Golden Tobie Private Limited v. Golden Tobacco Limited[225], evaluated dicta on this point including Vijay Drolia, followed it and held that when the dispute is centered around the agreement and is in respect of the agreement of the parties only, it is arbitrable. In *Angath Arts (P) Ltd. v Century Communications Ltd.*[226], The court held that the dispute did not relate to the ownership of the trademark or of the copyrighted material and was therefore not a dispute regarding a right in rem. Since the petition was for enforcement of a negative covenant in a franchise agreement, the dispute was arbitrable.

In *Ministry of Sound*[227], *Impact Metals*[228], *Deepak Thorat*[229], for example, the court styled the issue as a contractual issue while in cases such as *Mundipharma* and *Steel Authority*[230], the court classified the issue to be purely IP related issue.

However, as opined by the Court in the case of *Eros International v. Telemax*[231], and I agree, that We often have complex commercial documents and transactions that routinely deal with intellectual property rights of various descriptions as part of the overall transaction. This can be said of mergers, acquisitions, joint ventures, the setting up of special purpose vehicles, technology transfer and sharing agreements, technical tie-ups, licensing and so on. The range of fields of human activity that could possibly be covered by any one or more of these is limited by nothing but our own imagination : steel manufacturing, setting up of power plants, software, motor car manufacture, computer hardware, music, films, books and literature, performances and even services. If IPR disputes are altogether rendered non-arbitrable, then

[224] Arbitrability of Disputes Concerning Intellectual Property Rights, Petr Kalenský (Brno 2019), https://is.muni.cz/th/vjn0h/DP.pdf

[225] Golden Tobie Private Limited (Formerly Known as Golden Tobie Limited) v. Golden Tobacco Limited (2021) SCC OnLine Del 3029.

[226] Angath Arts (P) Ltd. v Century Communications Ltd., 2008 SCC OnLine Bom 475: (2008) 3 Arb LR 197

[227] Ministry of Sound International v. M/S Indus Renaissance Partners, 2009 SCC OnLine Del 11.

[228] Impact Metals Ltd. and Ors. vs. MSR India Ltd. and Ors. MANU/AP/0646/2016.

[229] Deepak Thorat v Vidli Restaurant Ltd., 2017 SCC OnLine Bom 7704.

[230] SAIL v SKS Ispat and Power Ltd., 2014 SCC OnLine Bom 487.

[231] Mundipharma v. Workhardt, 1990 SCC OnLine Del 269.

in any of these cases, where intellectual property rights are transferred or, for that matter, in any way dealt with, no dispute arising from any such agreement or transactional document could ever be referred to arbitration, and every single arbitration clause in any such document would actually, in his formulation of it, be void and non-est ab initio. It would have to be so — Sukanya Holdings[232] will not allow a dispute relating to intellectual property rights to be segregated from other disputes. The court termed this situation as an *"apocalyptic legal thermonuclear devastation"*.

In the case of a licence of intellectual property, the owner theoretically has the option of choosing his role ex post facto and seek remedies appropriately. But there is a catch: the parties have agreed to go for arbitration in respect of any dispute that may arise under or in relation to the agreement. This must mean that the owner of the IP has already opted for the role: that of a licensor of intellectual property. As a result, it must mean that the right sought to be enforced is that of the licensor. Having agreed to an omnibus arbitration clause, the licensor cannot later resile from the agreement. Given the public policy reasons in giving effect to arbitration clauses and given the absence of public policy reasons against giving effect to these clauses, there is no reason why this exercise of implied option should not be recognised. The concept of rights in rem and in personam are more nuanced than what was analysed in Booz Allen.[233]

Relief Test

A third rubric of the rights in rem debate is the relief test. Some Courts have relied on the relief test to determine whether the matter can be referred to arbitration or not. In *Rakesh Malhotra v Rajinder Malhotra*[234], the Court held "parts of the reliefs may be in rem and … therefore, the nature of the reliefs sought and powers invoked necessarily exclude arbitrability." The court focused on the relief sought by the parties to determine arbitrability instead of the nature of legal rights. According to the decision in HDFC *Bank v Satpal*

[232] Eros International v. Telemax, 2016 SCC OnLine Bom 2179.

[233] Thomas W Merrill and Henry E Smith, 'The Property/ Contract Interface' (2011) 101 Columbia Law Review 773-852.

[234] Rakesh Malhotra v Rajinder Malhotra, MANU/MH/1309/2014.

Singh[235], if the relief sought was in personam and one which could be granted by an ordinary civil court, the dispute would be arbitrable. Building on its analysis of actions in rem, the Court acknowledged that where the remedy sought is such that it would have an effect in rem, such a relief cannot be granted by private fora and hence, would be non-arbitrable. The crucial aspect determinative of arbitrability is the nature of judgment sought by the aggrieved[236]. If the judgment would affect the world at large, then such a judgment is a judgment in rem and is not arbitrable[237].

These conflicting tests have created uncertainty as to the categorization of disputes which are arbitrable[238].

Position post amendment of the Arbitration Act

In *Emaar MGF v. Aftab*[239], the Court observed that the "non obstante clause" in the s. 8 of the act added after 2015 amendment was to minimise judicial intervention. The refusal of judiciary is limited to the fact that prima facie no arbitration agreement exists. Therefore, the intervention by the commercial courts has been substantially reduced by the amendment. However, at the same time, the Court cautioned that the amendments cannot be given such expansive meaning so as to inundate entire regime of special legislation where such disputes are not arbitrable. This amendment was not intended to side-line or override the settled law on non-arbitrability.

The Law Commission submitted the 246th Report "Amendments to the Arbitration and Conciliation Act, 1996" in August 2014. The Commission in its Report has observed "judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration".

[235] HDFC Bank v Satpal Singh, 2013 (134) DRJ 566 (FB).

[236] Bina Modi and Ors. vs. Lalit Kumar Modi and Ors. MANU/DE/2305/2020.

[237] JOHN SUTTON DAVID ST. & GILL JUDITH, RUSSELL ON ARBITRATION 28 (22d ed., 2003).

[238] Arbitrability of Intellectual Property Disputes in India: A Critique Badrinath Srinivasan.

[239] Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751.

SOVEREIGN AND PUBLIC INTEREST

It is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject matter of a private adjudicatory process[240]. Redfern states that "*Whether or not a patent or trade mark should be granted is plainly a matter for the public authorities of the state concerned, these being monopoly rights that only the state can grant. Any dispute as to their grant or validity is outside the domain of arbitration.*" [241] Monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject matter of a private adjudicatory process[242]. If the subject matter of the suit is capable of adjudication only by a public forum, courts may refuse s. 8 reference[243].In Natraj Studios (P) Ltd[244]., it was observed that on broader consideration of public policy the disputes were non arbitrable[245]. The Final Report on Intellectual Property Disputes and Arbitration by the International Chamber of Commerce described the issue in the following manner: "…some intellectual property rights derive from legal protection granted on a national basis by the local sovereign power, which affords the beneficiaries certain exclusive rights to use and exploit the intellectual property in question. The existence, extent, meaning and application of such rights could legally only be definitively investigated, reviewed, explained, expanded, curbed, revoked or confirmed by the authority which issued or granted the right, by another specifically appointed body under that system or, in certain situations where very specific questions of law arose, by the courts of that country." [246]

There is a theory that intellectual property disputes — or aspects of them — are inarbitrable

[240] Vijay Drolia v. Durga Trading Corporation, MANU/SC/0939/2020.

[241] BLACKABY, Nigel; HUNTER, Martin J.; PARTASIDES, Constantine; REDFERN, Alan. Redfern and Hunter on international arbitration. 6th edition. Oxford, United Kingdom; New York, NY: Oxford University Press, 2015, p. 112.

[242] Common Cause v. Union of India, MANU/SC/0437/1999; Agricultural Produce Market Committee v. Ashok Harikuni and Anr., MANU/SC/0597/2000.

[243] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., MANU/SC/0533/2011.

[244] Natraj Studios (P) Ltd vs Navrang Studios & Anr, 1981 AIR 537.

[245] N. Radhakrishnan v. Maestro Engineers and Ors. MANU/SC/1758/2009; Abdul Kadir Samshuddin Bubere v. Madhav Prabharkar Oak and Anr. MANU/SC/0363/1961.

[246] International Chamber of Commerce, Final Report on Intellectual Property Disputes and Arbitration. International Chamber of Commerce [online], 2016.

per se. This theory is premised on the idea that even though the state usually remains in the background in other types of private disputes, whether similar — in the case of contract actions — or analogous — as with real property arbitration — intellectual property has certain intrinsic features that compel the state into the foreground, and thereby, invoke the order public. But, commentators are uncertain as to what these intrinsic feature[s] might be and why there is a public policy bar to certain types of intellectual property arbitration. This is in contrast to antitrust cases, where . . . the antitrust debate at least has the virtue of having been grounded in a serious discussion of the respective roles of the state and of private parties in such disputes. In the case of intellectual property, one cannot point to a body of similar case law or literature to support the premise that certain classes of dispute inherently invoke the state interest in such a way that they should automatically be excluded from arbitration.

In fact, it is difficult to see why an accused infringer would have the complete invalidation of the patent as one of its litigation objectives. A judgment of invalidity stands to benefit potential competitors to the alleged infringer, as well as the infringer itself, by making the patented invention available to all potential infringers. The alleged infringer is likely to prefer a broad and irrevocable patent license, leaving the monopoly intact for non-party competitors, and leaving the enforcement costs with the patentee. Thus, a potential infringer is unlikely to share a potential public interest in invalidating a patent.

On the contrary, as aforementioned, in Eros International[247] *and Hero Electric*[248], the court observed where parties to an agreement merely dispute the assignment of IP rights and are claiming that the other party has violated the first party's rights under an agreement, there is no conflict with sovereign governmental functions. Even in *Eros International*, the court ruled that an infringement action, unlike an action against registration, would only bind the parties to the dispute and was thus arbitrable.

[247] Eros International v. Telemax, 2016 SCC OnLine Bom 2179.

[248] Hero Electric Vehicles Private Limited and Ors. vs. ELectro E-mobility Private Limited and Ors., MANU/DE/0379/2020.

ERGA OMNES EFFECT

The jurisdiction of the arbitral tribunal is ousted in cases where arbitration proceedings would have an erga omnes effect as the arbitrator, whose powers are derived from an agreement between the parties, cannot bind non-signatories to the agreement[249]. The inter parties effect of an arbitral award is where the debate concerning arbitrability of certain IPR disputes stems from, as the registered IPR, unlike arbitral awards, possess an erga omnes effect. At first glance, the contract privity of the arbitral agreement and the nature of arbitral awards therefore seem incompatible and unsuited for the decision of disputes related to registered IPR and especially for disputes concerning the validity thereof[250]. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration. The court observed that certain intellectual property issues, such as the grant and issue of patents and the registration of trademarks, were exclusive matters which fell within sovereign governmental functions and had an *erga omnes* effect. Since the grant of such rights conferred monopoly rights, they were non-arbitrable[251]. Lifestyle Equities[252] also reaffirmed that there is a restriction to arbitrability of disputes relating to the validity of patents, pertaining to its erga omnes effect.

But again, if the dispute only appertains the rights involved in an agreement, it would not have an erga omnes effect. Interestingly, it has been observed, Indian law recognizes two different ways that a patent may be found invalid. The more general route, "revocation," extinguishes the patent monopoly. A finding of "invalidity," on the other hand, serves only as an inter partes defense to patent infringement. The defense of invalidity arises from the fact that, under the Patents Act, every ground on which a patent may be revoked is also available as a defense in a suit for infringement of the patent[253].

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[249] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2 (2d ed. 2012)

[250] COOK, Trevor M.; GARCIA, Alejandro I. International intellectual property arbitration. Alphen aan den Rijn, The Netherlands: Frederick, MD: Kluwer Law International, Arbitration in context series, v. 2, 2010, p. 69.

[251] Vijay Drolia v. Durga Trading Corporation, MANU/SC/0939/2020.

[252] Lifestyle Equities vs Qdseatoman Designs Pvt. Ltd., 2017(72)PTC 441(Mad).

[253] Fabcon Corp. v. Indus. Eng'g Corp., A.I.R. 1987 All. 338.

INTERNATIONAL COMPARISON

Internationally, patent disputes are allowed to be resolved through arbitration. Both the New York Convention, 1958 and the Model law on International Commercial Arbitration, 1985 provide for settlement of international disputes by way of Arbitration. WIPO went so far as to institutionalize the arbitration of IPR disputes by establishing WIPO Arbitration and Mediation Centre.

Countries which have adopted UNCITRAL law like Australia, Germany, Japan, and Canada have all validated arbitration of patent infringement and some even of patent validity. The ICC Commission has stated arbitration to be the "most desirable method for settling disputes arising out of intellectual property transactions." The ICC Final Report on Intellectual Property Disputes and Arbitration even states that "There are no substantive differences in arbitrations arising from intellectual property disputes as from other areas."[254]

In the ICC case[255], it was held that such a dispute involving license agreement does not necessarily involve issues of (in) validity, revocation of registration or other concerns that might interfere with the public interest or public policy. The arbitrators in this case therefore saw no reason why such a case would be under the exclusive jurisdiction of French courts, since it had only pertained to a breach of contract. The fact that the patent has been extinguished as a result of such a contractual breach was deemed irrelevant under the present circumstances. A similar observation was recorded in another case ICC[256].

As stated before, most economically developed jurisdictions hold intellectual property disputes as arbitrable. Some jurisdictions have even gone to the extent of holding issues

[254] International Chamber of Commerce. Final Report on Intellectual Property Disputes and Arbitration. International Chamber of Commerce [online]. International Chamber of Commerce. 2016, p. 23 [quoted September 11, 2018].

[255] Interim Award in ICC Case no. 5480, dated 1991, no. 5480, ICC Bulletin [online]. International Chamber of Commerce, © 1991 [quoted February 14, 2019]. Available at: http://library.iccwbo.org/dr-noaccount.htm?reqhref=%5Ccontent%5Cdr%5CAWARDS%5CAW_0035.htm%253Fl1%3DAwards%26l2%3DIntellectual%2Bproperty

[256] Interim Award in ICC Case No. 6709, dated 1991, No. 6709, ICC Bulletin [online]. International Chamber of Commerce, © 1992 [quoted February 14, 2019]. Available at: http://library.iccwbo.org/dr-noaccount.htm?reqhref=%5Ccontent%5Cdr%5CAWARDS%5CAW_0257.htm%253Fl1%3DAwards%26l2%3DIntellectual%2Bproperty

relating to validity of intellectual property rights in disputes relating to licensing of intellectual property rights as arbitrable[257].

CONCLUSION

Needless to say, the conundrum persists as to whether IPR disputes are arbitrable or not. The pendulum of conflicting decisions has left the issue still open and controversial.

From the analysis of the above cases, it is apparent that different views have been taken by the judges of the Hon'ble Supreme Court and High Courts of India. Though from the analysis of the above cases, it is obvious that there can be no blanket bar on the arbitrability of the disputes relating to IPR arising out of the agreement entered by the parties and it will depend on the facts of each case.

From the above illustrations, it is manifest that if a dispute is arising out of the terms of the contract between the parties, and the dispute falls within the ambit of the arbitration clause of the contract, even though such dispute pertains to the copyright or trademark infringement, it still could be decided by arbitration as it will fall under the ambit of right in personam.

Though most of the IPR disputes arising out of the contract will be amenable to arbitration but not every dispute. Whether a particular IPR dispute arising out of the contract can be adjudicated through arbitration will depend on the facts of each case.

I would suggest that it is imperative for foreign investment and globalisation in India that the Courts adopt wider approach to enhance arbitrability of IPR disputes. It is high time that Indian judiciary realises this requirement as it would eventually mitigate the hesitation amongst the foreign parties in building business with Indian parties.

[257] ocie´te´ Liv Hidravlika D.O.O. v S.A. Diebolt, Paris Court of Appeal (1st chamber), February 28, 2008, cited and quoted in Dario Moura Vicente, 'Arbitrability of Intellectual Property Disputes: A Comparative Survey' (2015) 31 Arbitration International 151, 155.

I P BULLETIN

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VARIOUS KINDS OF INTELLECTUAL PROPERTY RIGHTS

Mayank Pandey

INTRODUCTION

Innovations, artistic work, images, literary work, technical, scientific creation, designs and symbols, these all are the creation of individuals' mind and these should be protected at any cost so that there cannot be any infringement of one's creation. Intellectual Property Rights (IPR) helps to protect the innovative work done by the individual.

IPR got its roots from the Europe. In the fourteenth century, the trend of granting the patent was started. Italy was the nation where the first known copyright was appeared. The cradle of the IP system can be considered Venice where the most of the legal work and the thinking work was done. In the Venice itself all the laws and system were made for the first time in the whole world and other countries started following that work afterwards.

Patent Act was introduced in the year 1856 in India. This Act was in force for more than half century years, however, later in the year 1911 this Act was revised and was called 'The Indian Patents and Designs Act, 1911.

In the IPR, the right is given to the person for a specific period of time so that the inventor of any invention can utilize his or her legal right of the invention or the creation that they have done. In the modern times, IPR plays a very well pivotal role. The innovation and creativity can flourish in the environment by striking a balance between the right of the inventor and use of such innovation. Thus, IPR provides the incentive to the public at large that they can

make the use of the other person creativity by ensuring that there cannot be any unfair use of the creation or work.

IPR is a great tool to protect the time, money and efforts made by a person who has invested all of these to do something innovative. Apart from this, IPR also provides the remedy if the work done by the individual gets stolen or is inappropriately used by the other person. The innovator has the right that they can sue the person who has made the unfair use of the work. That stolen work will be stopped and the innovator will be compensated if any damages are caused.

In the upcoming paragraphs, various kinds of Intellectual property rights will be covered along with the topics likewise, issues related to the various kinds of the intellectual property rights such as issues in the area of copyright, trademark and designs will be covered.

VARIOUS KINDS OF INTELLECTUAL PROPERTY RIGHTS

COPYRIGHT

Copyright is granted to the individual who has done the original work likewise, literary work, dramatic work, musical and artistic works, cinematographic work, sound recordings, computer software, drawings maps, charts and TV and broadcasts. The exclusive right is given to the author that he can publish and sell the copies of his original work. This right is given for a specific period of time.

In India, the Copyright Act was introduced in the year 1957 was which later on amended in the year 1999. This Act is amended five times in the year 1983, 1984, 1992, 1999 and the latest amendment was done in the year 2012. The latest amendments in 2012 were brought to make the copyright law compliant with WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty, introduced technological protection measures.

The Copyright Act is divided into 15 chapters with 79 sections. Under this Act, Section 13 provides the protection for the work on literary work, dramatic work, musical work, artistic works, cinematography work and film recording. [258]Section 14 of the act gives the exclusive

[258] The Copyright Act, 1957, No. 14, Acts of Parliament, 1949 (India).

right to owner for the protection of his original work.

Issues related to Copyright

Copyright Infringement: When any person without the prior permission of the owner uses his work, such conduct amounts to the Copyright Infringement. Copyright Infringement occurs when someone intentionally or unintentionally copies the work of the other person without giving the credit to that person.

The main elements of copyright infringement are that the work is the original creativity of the author that the person has actually copied the work of the author and it has to essentially prove that the person has infringed the right of the author.
Section 51 of the Copyright Act deals with the Copyright Infringement:

According to Section 51 of the Act, Copyright is deemed to be infringed if:

- A person without obtaining the permission of the copyright holder does any act which only the copyright holder is authorized to do.
- A person permits the place to be used for communication, selling, distribution or exhibition of an infringing work unless he was not aware or has no reason to believe that such permission will result in the violation of copyright.
- A person imports infringing copies of a work.
- A person without obtaining the authority from the copyright holder reproduces his work in any form."

In *Sajeev Pillai v. Venu Kunnapalli*[259] and Ors, the Kerala High Court held that an author has a legal right to protect his Intellectual Property even after he has sold his rights to another person.

Facts

Sajeev Pillai, who was the movie director and a screenplay director, made a claim that he has researched the history of a splendid festival called Mamankam and the script was set on the same epic. Sajeev Pillai met Venukunnapalli (second party) and he signed a Memorandum of

[259] Sajeev Pillai v. Venu Kunnapalli, 2019 SCC Online Ker 5338.

Understanding (MOU) with the film company called Kavya Film Company that company was in link with the Kunnapalli.

Initially Sajeev was appointed as a director and when he completed his service he was replaced by the some other person. The shooting of film was done and it was finalized when Sajeev stated the whole script but it was all done by disfiguring, by misleading and by changing the script made by Sajeev.

Decision

In this case, Kerela High Court decided that Section 57(1) of the Copyright Act provides an offer to the author that he can imprison the third party and under sub-section 57(1)(b), the author has right to claim the remedies from the third party in the matter of the any alteration done or any other disfigurement or any other modifications to the work of the author or to take any other action which is injurious to author's respect or the status.

This gave the appellant a supreme advantage that the legal right to claim ownership would not drain for the consignment of his work.

Other issues related to Copyright

Plagiarism: One can use the work or material of the author for some research. But when someone copies and pretends that this work is the original work done by him, such act is called plagiarism. Herein, the permission is granted to the person to refer the work of the author but the individual herein who is using the work of the other author has to give the credit to the original creator of the work or to the copyright holder.

Derivative Works: When someone uses the already existing work of the other is called derivative work. It is the new version of the already existing work. Someone who has not obtained the proper authority for using the work of some other person shall be made liable for committing the copyright infringement.

PATENT

Patent is an exclusive right which is granted to the inventor for his inventions by the government and also the right is given to him to make use and sell that invention. This right is given for the specific period of time. The main aim of giving the right to the inventor is that they can do more progress in their field.

The word "patent" is derived from the Latin word "*patere*" and it means "to lay open". In other words to make available for public inspection.

In India, patent is covered under the Patents Act, 1970. To comply with the commitments of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Patent Act has been amended three time since 1995. TRIPS Agreement is a minimum standards agreement which allows the Members to provide more extensive protection of intellectual property if they wish so.[260]

First amendment of the Patents Act was made in the year 1999, second amendment in the year 2002, before the third amendment Patents (Amendment) Ordinance was promulgated by the President of India which was later on replaced by the Third Amendment Patents Rule, 2003. It was supporting the former legislation. Indian Patent Office in the year 2014 released a series of guidelines pertaining to issuance of pharmaceutical patents. To establish a uniform standard of patent grant/examination, features of various court decisions are incorporated in these guidelines. There is an expectation of bringing in uniformity with regard to scrutiny of patent applications.[261]

Section 3 and 4 of the Act[262] defines that what can be patented in India. The most important consideration to be taken here is that whether the invention made by the inventor relates to the patent subject matter. Section 3 and 4 of the Act lists out the non-patentable subject matters and if any invention does not come under any provision of the Section 3 and 4 of the Act that will not be considered as a subject matter for a patent.

[260] World Trade Organization, https://www.wto.org (last visited May. 16, 2022).
[261] The Economic Times, https://economictimes.indiatimes.com/small-biz/legal/recent-developments-in-intellectual-property-laws-in-india-part-2/articleshow/47780087.cms (last visited May. 16, 2022).
[262] The Patent Act, 1970, No. 39, Acts of Parliament, 1949 (India).

Issues related to the Patent

Patent Infringement: Patent infringement is done when the unauthorized use of the inventor's work, production or sale of work which comes under the subject matter of the patent is done by the other person. The basic idea behind the patent infringement is that there should not be an unauthorized use of the patent holder work without his permission.

Section 48 of the Patent Act gives the right to the patent holder that patent holder can exclude the third party who makes, uses, offers or sell the patent work which comes under the subject matter of the act during the valid period of the time. This creates the monopoly over the work of the patented invention and patented product. Any activity made by any person which violates the monopoly will be considered as patent infringement.

In the case of *Bayer Corporation vs. Union of India*[263], the Bayer Corporation in the year 2008 was granted the patent right by the Indian Patent Office for the drug named 'Sorafenib Tosylate' for the treatment of liver and kidney cancer. Later on, in the year 2021 Natco Phama was granted with the first ever license to produce a generic version of this drug by the Drug Controller of India which is defendants in this case. Plaintiff during the course was selling the drug for Rs2, 80,000 per month and defendant herein promised to make the drug available at the rate of 80,000. Plaintiff then was aggrieved with the fact that the license which is granted to the Natco was invalid, illegal and unsustainable and they moved to IPAB asking for stay on the license. However, IPAB herein rejected the appeal made by the plaintiff by stating that the license granted in the public interest because of the lower price allowed the public to access it. Later on, plaintiff challenged this order in the Bombay High Court.

In this case, the issue was made that whether the license which is granted by the DGCI was accordance to the provisions of the Patent Act. The High Court in this case dismissed the petition made by the plaintiff by upholding that the public interest is always prioritized. The court held that as per the Section 90 of the Patents Act, DGCI can allow the commercialization of the genetic drugs as they are patented in the public interest. Furthermore, court held that the acceptance of the generic drugs does not amount to the patent infringement.

[263] Bayer Corporation vs. Union of India, 2014, (60) PTC 277(Bom).

Patent issue related in the field of Biotechnology

With the inventions and developments in the area of pharmaceutical science and the environment sector bio-technology plays a very important role in the economy of the country. As patent applies to all the fields of technology so does it apply to the bio-technology as well. The new challenges have opened up in the case of bio-technology when we talk about the criteria of the patentability which includes the novelty, the utility and the non-obviousness. It is a tough task to identify the characteristic of novelty in the living beings. The reason of this is that the living being exist naturally thus it becomes practically difficult not possible for them to be novel.

Other great concern is getting the patent of human genome. The main issue here is that what kind of patent it will be because human genes are the ones that occurs naturally they are only discovered but not invented.

Various Unique features of the new innovations leads to the difficult questions related to interpretation and understanding the patent law. In modern technology the difference between the invention and discovery is getting blurred.

The current framework of the patent fails to provide the sufficient protection to the field of bio-technology. The main reason behind this is that the engineered inventions are very complex and they are precisely and accurately described thus this makes the hard to decide that whether such invention is following under the criteria of patentability or not.

Moreover, there is also a possibility in providing the benefit to the undeserving patentee in the case of bio-technology under patent law. This may happen because it happens that intricacies involved in making the inventions likewise of gene fragments, genetic tests and proteins in the fields where the real work in not known in such kind of inventions it is possible to grant the patent.

Issues of patents in Public Health

Talking about improving the public health that main aim remains with the authorities is that to ensure a balance between the right of the inventor for creating a product or the process of

improving the health sector and finding ways of implementing those for providing the help and to meet the requirement of the general public. Negotiation is done in the developing nations with the patent holders that nation that the drugs will be provided to them at a lower cost. This happens because certain companies herein agreed to help the poorer nations with the medicines so that they can fight with the fatal and severe diseases. To attain the public health both the sectors public and private have to involve each other and understanding the importance of the joint ventures and legalizing innovations.

Doha Declaration under the paragraph 5(2) says that "freedom to determine the grounds upon which such licenses are granted" and it also highlights the idea of the compulsory licensing. Thus, the Doha Declaration puts the time that when the rights of the inventor can be exclusive and when it can be abridged so that large public interest can be achieved.

TRADEMARK

Trademark is a distinctive sign or a symbol which is used by the business organization, individuals or any established legal entity. This sign or symbol is used to differentiate the product and service of one entity from the others. Trademarks serves as a badge for any brand in order to communicate with the consumers and so that customers can remember the brand name by its unique sign or symbol.

Trademark has gained the remarkable importance in the intellectual property. Owners and manufacturers are fully aware about the importance of trademark and rights and advantages that comes along with the registered trademark. In India, there are several number of trademarks are there under which the owner of trademark can register and seek the legal rights and protection.

In India, trademarks are regulated under the Trademark Act, 1999. According to the Section 2(zb) of the Trademark Act, 1999 trademark means "a mark of graphical representation and which is capable of distinguishing good and services owned by one person from those of the others in the market and includes the shape of goods, the combination of colors and their packaging"

The main function of trademark is that to make the one brand stand out that belongs to the

same class of other goods and services and make one brand distinctive from the other brands.

Trademark Infringement

Trademark infringement is done when a person who is not the registered proprietor or the person who has created the same mark or the mark which is identical to the already registered mark. In this case when the infringement is done, owner of the respective trademark can go for the civil proceedings against the person who has infringed the registered trademark. In other words, trademark infringement means the unapproved use of the trademark which is related to any product.

In India, Trademark Act, 1999 is the legislation that protects and guarantees the rights to the owner of the trademark. This act lays down the provisions which are related to the registration, protection and the penalties that are available when the infringement is committed. Trademark can be infringed by direct or indirect way. o bring Indian trademarks law in line with international practices and to ensure implementation of India's commitments under the TRIPS Agreement, India replaced the Trade and Merchandise Marks Act, 1958, with the Trade Marks Act, 1999.[264] Several changes were incorporated, like "trademark" now includes graphic representations, shapes, packaging and combinations of colors. This has widened the scope IPR protection. The period of renewal and resignation has also been increased from seven to ten years.

To give the protection beyond the use of identical similar marks for the goods in relation for which they are registered, the definition of trademark infringement has been broadened.

Case law on infringement

In the case of *Hearst Company vs Dalal Avenue Verbal Exchange Ltd.*, the court in this case held that trademark is infringed when a character which is in the course of the trademark the use of a mark which is similar to the other trademark which is in respect of the same goods or services and that trademark is registered.

In the case of *Amritdhara Pharmacy vs. Satya Deo Gupta*[265], the Supreme Court determined the connection between the two words which create confusion and are related to the

[264] *Id* at 4.
[265] Amritdhara Pharmacy vs. Satya Deo Gupta, 1963 AIR 449.

infringement action. Two tests were laid down for determination of infringement. That there must be the goods that are to be utilized. That there must be a consideration of nature and customer who will be buying the goods. After considering all the circumstances, the Court came to the conclusion that there will be confusion that not significantly of one man will get injured and then the other man is going to gain the illegal benefit. Then there is going to be a confusion in the minds of the public regarding the goods and there will be the refusal regarding the registration of the trademark.

GEOGRAPHICAL INDICATION

The Geographical Indications are also known as a Geographical Indication Tag. Geographical Indication is given to the certain commodity or the product which is differentiated on the basis of the different geographical location that includes the place of the origin, town or the country. For instance, Darjeeling Tea is granted the geographical indication and it is the first product to be granted geographical indication tag. The tag is given to the specific product according to the criteria that this specific product is produced following the traditional methods and it also certifies certain qualities and which is produced in a particular region.

Geographical indication regulates to the use of the indication that the right to use the indication is given to the specific region and geographical indication regulated the third party from taking any undue advantage of the product.

A geographical indication is regulated under the Intellectual Property Rights. The protection and right is given over any particular sign and that sign depicts the specific indication. Geographical indication is also covered under the Paris convention for the Protection of Industrial Property. From the international prospective geographical indication are governed by the **World Trade Organisation (WTO)**. It is an agreement related to the trade aspect which is **TRIPS**. In India, Geographical Indication of Goods (Registration and Protection) Act, 1999 is there to regulate the aspects related to the geographical indications.

Issues related to the Geographical Indication

Infringement of Geographical Indication: The registered Geographical Indication is infringed when the other person who is a registered owner under the Geographical Indication Act that person uses the sign of the goods that is originated in the another geographic area, which creates a confusion in the other people's mind that the goods belong to that particular place.

A geographical indication is also infringed when an unauthorized user or the person who is not registered owner under the Act uses another geographical indication for the goods, which is true to its area and locality where they are emerge from. Doing the misrepresentation of the goods originated in another region used by the unauthorized person is infringement of the geographical indication.

Article 22(4) of the TRIPS Agreement emphasizes about preserving the geographical indication of the trademark stating that it should be enforced even if the Geographical Indication "literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory."[266]

In the case of *Banglar Rasogolla vs. Odisha Rasagola*, in this case in the 2017, the "West Bengal State Food Processing and Horticulture Development Corporation Limited" was registered as Geographical Indication as Ras Banglar Rasogola. It was witnessed that state which would win the battle would win the famous dessert and Bengal won the dormant between Odisha and Bengal. This legal battle for the geographical indication registration started when the objections regarding the geographical indications was lodged and it was claimed that the famous dessert was originated at Jagannath temple in Puri, Odisha. In the February 2018 an application was filed to remove the registration of the geographical indication.

Meanwhile, in July 2017 the Geographical Indication registry notified that Odisha is registered under Geographical Indication as "Odisha Rasgola". After this various reports were released. It was noticeable here that registry did not register the word all Rasogola/Rasgola.

[266] World Trade Organisation, https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm (last visited May 16, 2022).

Rasogola/Rasgola is a general term which can be used by any person in their trade. So, as a result two of the states Odisha and Bengal neither got the monopoly over the word of Rasogola/rasgola. Therefore, the word rasgulla/rasgola can be used in any trade or business because it is free to sell the sweets to anyone in the trade. The words "Odisha rasgola" and "Benglar rasogola" were prohibited to use by any other unauthorized and authorized users under the law.

CONCLUSION

It can be concluded that the change in awareness of intellectual property rights has emerged in the recent times. Alongside, the rights have been conferred in the area of patents, copyright, trademark and geographical indications. Intellectual Property Right is a legal right which is given to the creator so that he can protect its work from any unauthorized use for a certain period of time. IPR is a great tool to secure the time invested by the creator in his creativity.

Patent helps the inventor to create in monopoly over the inventions and developments. It gives the benefit to the inventor to enjoy the monopoly. Copyright is there to provide protection to the rights of the creator and to create some benefits for the economy. If any person infringes the copyright then that person will be held liable for both civil and criminal liabilities.

The tag under the geographical indication is important as it is the essential component and helps to create and maintain the originality of the product or the region where the product was originally created.

Under the trademark law one can register any unique sign or symbol to differentiate one brand product from the others. Remedies are also available when the trademark is infringed by any person and they try to ruin the reputation of the recognized brand. Trademark acts a shield to protect the one brand identity from its other competitors.

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SIKKI WALL HANGINGS - AN INNOVATIVE VETIVER ART DEVELOPED IN MITHILA AREA OF NORTH BIHAR, INDIA

Dr. Vidyanath Jha[267]

ABSTRACT

Mithila area in north Bihar is known for its rich culture that is depicted in the form of varied art forms like Mithila painting and grass based craft. Container based Sikki items were traditionally carved from the stalks of vetiver grass through weaving. A recent innovation in Sikki art, initiated some three decades back by ***Rachna Sikki Hastakala Kendra*** *at village Rampur in Pandaul block of Madhubani district is based on bending-cutting-pasting method. This has led to the carving of exquisite wall hangings that have become popular and are in high demand from even foreign countries. Vetiver stalks, technically the peduncle of the poaceous grass Chrysopogon zizanioides (L.) Roberty, provide the basic raw meterial for this art. This multifacted grass is also worshipped in this region as a sequel to sun worship and provides a fine example of land conservation practice deeply entrenched in Mithila culture.*

Mithila area in north Bihar is known for its rich culture that finds manifestation in the form of Mithila painting and carving of grass based containers of various hues (Jha and Basak 1994, Jha *et al* 1994, Jha 2004 etc.). There is a practice of planting vetiver and other grasses for stabilisation of sand in the floodplaains (Jha *et al* 2014). Vetiver has a great potential for rural development (Jha and Saha 2006, 2016). Progressive farmers are now integrating vetiver plantations with staple crops, medicinal plants and timber tree (Jha *et al* 2015).

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Vetiver grass grows abundantly in the flood plains of Mithila region of Bihar. Its earlier name *Vetiveria zizanioides* has now been changed to *Chrysopogon zizanioides.* Stalks of this grass are collected by the rural women after the rains come to an end. This mutlifaceted grass (known as **Katarajhar** in Mithila region) is now cultivated for its aromatic roots. The late king of Thailand (Bhumbol Adulyadej) was a great connoeissur of this grass where it was assigned the status of a royal grass. The grass is eulogised for its high capacity of soil binding. It was during his life time that his birthday, the 5th of December was christened as World Soil Day, keeping in view his contributions in this endeavour. The grass is extensively planted for amelioration of soil health in several countries. It is also planted alongside the national highways and railway lines, to ensure their safety against hight floods.

Rural women in Mithila region formally worshipping vetiver grass on the occasion of initiation and conclusion of **Ravivrata** The grass has a sacred status in India. Its fragrant roots are used for making garlands, curtains and head fans. '**Garud Puran**' refers to its ritualistic use in **Dashgaatkarma** performd after the death of Hindus. Vetiver root is formally put is chest on the occasion of Deepawali, wishing blessings of the Goddess of Wealth. An innovative form of Sikki art, mainly in the form of **wall hanging** was innovated by Shri Dhirendra Kumar, son of Sri Jagat Narayan Das of village Rampur in Pandaul C.D. block of Madhubani district in Mithila region of north Bihar. He was born on the 17th July 1967. He set up Rachna Sikki Hastakala Kendra at his village. As against the traditional Sikki art, based on making containers of various shapes obtained through weaving the stalks, this new form is based on bending-cutting-pasting method. About 600 women and 100 men have been trained by him in the process of carving exquisite wall hangings made of the vetiver stalk that is technically the peduncle of its inflorescence that is available at the end of rainy season.

Sri Kumar has been decorated with several awards for his contribution in Sikki Art. These include- State Award by the Udyog Vibhag of the Govt. of Bihar (2015-16) and National Award by the Ministry of Textiles, Govt. of India (2016). Dastakar (an NGO working in the field of Art) has also appreciated his contribution. He has trained artists as invited resurce person at the Patna based Upendra Maharathi Shilp Anusandhan Sansthan (June, 2017) and at Patna and Kangra based National Institutes of Fashion Technology.

Teachers and Students of the Six-month certificate course in Sikki art offered by the faculty of Fine Arts, L.N. Mithila University, Darbhanga. L to R front row- 1. Prof. L.K. Singh, 2. Mrs. Sudhira Devi (another accomplished traditional Sikki artist), 3. Present author and 4. Sri Dhirendra Kumar

To promote his endeavour Distirct Rural Development Agency (DRDA), Madhubani established a centre at his village that was later taken over by the Union Ministry of Textiles. This Common Facility Center was initiated for promoting this innovative form of Sikki art. The noted folk artist Padmashri Malini Awasthi was presented a Sikki portrait of herself made by his center duing her visit to Darbhanga in a seminar '**Lok Ke Rang**' organised by the faculty

of Fine Arts, L.N. Mithila University on the 3rd March 2021.

An NRI (USA based) has placed orders for conversion of miniature painting on prince and princess of Rajputana in Sikki art.

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Vetiver has attracted a wider scientific attention that is evidenced by the organisation of seven International Conferences on Vetiver (ICV). ICV-5 was held at the CSIR-CIMAP (Central

Institute of Medicinal and Aromatic Plants), Lucknow during Oct.-Nov 2011. This author had an occasion to participate in this conference. King of Thailand Vetiver Awards and TVNI (The Vetiver Network International) Awards were conferred on this occasion.

Bihar Industries Minister Shahnawaj Hussain presenting a Sikki Wall Hanging depicting Lord Buddha to the Hon'ble President of India Sri Ram Nath Kovind, during his recent visit to Patna.

Vetiver items have a rare property of evading the attack by insects and other pests. It is on this ground that household items like spices and masticatories are preserved in the Sikki containers for long time.

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